Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

TERMORIO S.A. E.S.P. and LEASECO GROUP, LLC,
Petitioners,

v.

ELECTRIFICADORA DEL ATLANTICO S.A. E.S.P. (in liquidation) and REPUBLIC OF COLOMBIA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When exercising its discretion under the New York Convention to decide whether to defer to a foreign court proceeding nullifying an international arbitral award, is a United States court required to ignore the substantive basis of the foreign nullification decision and address only the question of whether the nullification proceeding was procedurally "tainted"?

2. Should a United States enforcement court defer to a foreign nullification decision where that decision is based on grounds that the New York Convention expressly excludes as a defense to enforcement?

PARTIES AND RULE 29.6 STATEMENT

The caption of the case contains the names of all of the parties.

Petitioner TermoRio S.A. E.S.P. ("TermoRio") has been liquidated and its assets have been assigned to petitioner LeaseCo Group, LLC, which had owned over 99 percent of the shares of TermoRio prior to liquidation. LeaseCo has no parent corporation. No publicly held corporation has any ownership interest in either TermoRio or LeaseCo.

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Jan Paulsson, *The Case for Disregarding LSAs (Local Standard Annulments) Under the New York Convention*, 7 Am. Rev. Int'l Arb. 99 (2006) 12, 13, 20

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TermoRio S.A. E.S.P. and LeaseCo Group, LLC petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The District of Columbia Circuit's opinion is reported at 487 F.3d 928. Appendix ("App.") 1-26. The opinion of the district court (D.D.C.) is reported at 421 F. Supp. 2d 87. App. 29-64.

JURISDICTION

The opinion of the Court of Appeals was filed and judgment entered on May 25, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

TREATIES AND STATUTES INVOLVED

28 U.S.C. § 1391; 9 U.S.C. §§ 201-02, 301-02, 305; Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301 ("Geneva Convention"); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, S. Treaty Doc. 90-21 (1970), 21 U.S.T. 2517 ("New York Convention"); and Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, S. Treaty Doc. No. 97-12 (1981), 1438 U.N.T.S. 245 ("Panama Convention") appear verbatim at App. 66-96.

I. STATEMENT OF THE CASE

A. Introduction

This case presents critical questions regarding the United States judiciary's responsibilities under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the "New York Convention" or "Convention"). In particular, it involves the situation in which an arbitral award has been "nullified" by a court of the nation in which the arbitration took place, and the manner in which enforcement courts (i.e., courts where claimants seek to enforce awards) should decide whether to defer to such nullification decisions.

The Convention was adopted to enhance and standardize the enforceability of international arbitration agreements and awards. It is strongly biased in favor of enforcement, and this bias is manifested throughout the Convention's specific terms. The grounds that an enforcement court may recognize as defenses to enforcement are narrowly defined. Moreover, even where local courts purport to "nullify" awards, enforcement courts are expressly given discretion to disregard those nullifications and enforce the awards. This grant of discretion ensures that awards meeting the Convention's standards can be enforced despite local opposition. It constitutes a deliberate change from the prior regime, in which national courts had ultimate authority over awards rendered within their jurisdictions (thus largely defeating the purpose of international arbitration agreements, which are frequently executed in order to avoid the jurisdiction of forum-state courts).

In the case below, the District of Columbia Circuit was faced with the question of how an enforcement court should decide whether to defer to, or instead disregard, a forum-state nullification decision. It answered that question in a manner that greatly undermined the international arbitration regime set forth in the Convention. According to the D.C. Circuit, the enforcement court's discretion is extremely limited: it *must* defer to any foreign nullification decision—regardless of the substantive basis of that decision—as long as the nullification action was *procedurally* proper. *See* App. 3 ("Because there is nothing in the record here indicating that the [forum-state nullification proceedings] were tainted or that the judgment of that court is other than authentic, the District Court was, as it held, obliged to respect it.").

The D.C. Circuit's rule largely eliminates the enforcement court's role in protecting valid awards from improper forum-state interference, and would enable a losing arbitrant effectively to sidestep the Convention's carefully crafted pro-enforcement regime through a simple procedural maneuver. Under that court's rule, a losing arbitrant could bring a post-award nullification action in the forum-state court—often the very court that its adversary sought to avoid by signing the arbitration agreement—asserting a defense forbidden by the Convention. If the forum-state court nullifies the award based on such a defense, and the enforcement court defers to that decision, the successful arbitrant's rights are extinguished despite the specific provisions adopted by the Convention's signatories to avoid this result.

That is what happened in this case. Petitioners won a substantial award against an instrumentality of the Colombian government in a procedurally impeccable arbitration. The Colombian government sued for nullification in a Colombian court, and that court nullified the award based on a defense explicitly eliminated by the Convention. Petitioners sought to enforce their award, asking a United States federal court to honor its Convention obligations by disregarding the Colombian decision. But the D.C. Circuit refused even to *consider* the basis of the nullification decision, or whether that decision was consistent with the Convention. It stated that because the Colombian nullification action appeared to have been *procedurally* fair, the United States courts were obligated to defer to the Colombian court's decision. *See* App. 3.

Petitioners respectfully submit that the D.C. Circuit completely abdicated the judiciary's critical role under the Convention. By effectively telling international venturers that their arbitration agreements and awards are ultimately subject to the final authority of the forum-state's courts, despite the Convention's contrary directive, the D.C. Circuit's rule drastically undermines the confidence in international arbitration, and the resulting stimulus to international commerce, that the Convention was intended to provide. Moreover, that court's ruling is essentially the last word on the subject with respect to arbitration involving foreign governments, as actions to enforce such awards must generally be brought in the District of Columbia federal district court. Petitioners seek this Court's review to correct the D.C. Circuit's serious error and reinforce the United States judiciary's commitment to its Convention obligations.

B. Factual Background

In the 1990s, respondent Republic of Colombia ("Colombia") solicited foreign venturers to assist in providing electricity to residents of Colombia's Atlantic coastal states. JA 0340.[1] Petitioner LeaseCo Group, LLC ("LeaseCo") responded to this solicitation and agreed to undertake a large-scale investment in Colombia. *Id.* Because Colombian law provided that the contemplated energy contracts had to be executed through a Colombian entity, LeaseCo made its proposal through a qualifying Colombian corporation. *Id.* This proposal was accepted by respondent Electrificadora del Atlantico S.A. E.S.P. ("Electranta"), a public utility owned by the Colombian government and charged with the responsibility of implementing the government's foreign partnership plan. App. 3. Upon this acceptance, LeaseCo and its Colombian partner corporation formed another Colombian entity—petitioner TermoRio S.A. E.S.P. ("TermoRio")—as the vehicle for their venture with Electranta. App. 3-4. TermoRio and Electranta signed a Power Purchase Agreement (the "PPA") providing that TermoRio would supply power to Electranta over a 20-year term. *Id.*; JA 0343.

Over the next 18 months, TermoRio spent more than $8.5 million developing a new power plant in Colombia. JA 0343. Then, the composition of Colombia's government changed, and the new authorities decided to privatize Electranta. *Id.*; App. 4. Ultimately, the new government officials informed TermoRio that they had made a "business decision" to repudiate the agreement. JA 0346. Electranta's assets were transferred to a new

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[1] "JA" refers to the Joint Appendix in the D.C. Circuit.

company (which was sold to foreign investors), but the PPA was not transferred, leaving Electranta without any resources to purchase power from TermoRio. App. 4.

The PPA, as amended in the interim, contained an arbitration clause providing that disputes between the parties would be resolved by arbitration in accordance with International Chamber of Commerce ("ICC") procedural rules. App. 5. TermoRio invoked this clause and filed a complaint with the ICC. *Id.* The ensuing arbitration took place before a panel of three distinguished Colombian jurists selected according to ICC rules. JA 0018. After a proceeding lasting many months, this panel ruled in TermoRio's favor. It found that Electranta (with the aid of the Colombian government) had breached the PPA in a "reprehensible" manner, and assessed damages of more than $60 million. App. 5, JA 0018-19.

Electranta and the Colombian government immediately challenged the award within the Colombian court system. These challenges eventually came before the Council of State, Colombia's highest administrative court. App. 6. Reversing its prior determination that it lacked jurisdiction over the case, the Council nullified the award. JA 0348-49. According to the Council, at the time the PPA was executed Colombian law did not allow parties to choose arbitration procedures not affirmatively set forth in Colombian procedural law. JA 0248-63. Accordingly, even though Colombian law explicitly allowed party-chosen procedures when TermoRio invoked the arbitration clause,[2] the Council determined that the parties' choice of ICC procedure prior to this change constituted an "unlawful object" such that public policy

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[2] *See, e.g.*, JA 0878, ¶ 9(a).

forbade enforcement of the arbitration agreement.[3] According to the Council, the award, which had its jurisdictional source in the agreement to arbitrate, was null and void *ab initio*. JA 0262.[4]

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[3] *See, e.g.*, JA 0260:

> Therefore, as the arbitration clause agreed upon between Electranta and Termorio contains that prohibition, that is, unlawful object, *because they chose to agree on a procedure which was not the procedure established by the law*, in violation of section 3 of Article 87 of the Administrative Code, amended by Article 32 of Law 446, 1998, and Article 1742 of the Civil Code, subrogated by Article 2 of Law 50, 1936, and this Court declares the absolute nullity of that stipulation in the contract, as that nullity has been fully demonstrated. (Emphasis added.)

See also, e.g., JA 0262:

> Except for the specific authorization which the Constitutional Court gave to private persons to agree upon regulations for an arbitration, only in the cases in which the law is silent, a condition to which the constitutionality of number 3 of Article 13 of Law 270, 1996 was subjected, *private persons are not entitled to invent a procedure to substitute or modify procedural laws established by the legislator*, because, as explained before, they are public order laws and may not be derogated by the will of the parties.
>
> Therefore, this Court declares the absolute nullity of the arbitration agreement signed by Electranta and Termorio, because there is [n]o legal exception that can justify it, and, therefore, it is also necessary to annul the Arbitration Decision and the arbitration process which was conducted based on that agreement. (Emphasis added.)

[4] The Council of State reached this decision in apparent contravention of Colombian law providing that the relevant aspect of the arbitration agreement's validity was governed by the law in effect at the time of the arbitration, not the law in effect at the time the agreement was executed. *See* JA 0882-83, ¶ 14.

C. Proceedings Before the United States Courts

Following the Council's decision, TermoRio and LeaseCo[5] brought an enforcement action in federal court pursuant to the New York Convention, which provides that an arbitral award may be enforced despite having been nullified by a court in the forum state.[6] Among other arguments, TermoRio and LeaseCo noted that the New York Convention expressly grants parties the right to choose their own arbitral procedures and forbids courts from nullifying awards based on domestic procedural law when they have done so. Accordingly, they argued, the Council's nullification decision was expressly based on

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[5] During the pendency of the proceedings before the district court, TermoRio assigned its arbitral award to LeaseCo. App. 34, 38-39. The district court nonetheless held that LeaseCo lacked standing to enforce the award. *Id.* at 38-39. The D.C. Circuit declined to address this issue, as TermoRio's standing was undisputed and the D.C. Circuit's disposition made resolution of the LeaseCo standing issue irrelevant. *See, e.g.*, App. 7-8.

Similarly, in addition to Electranta, petitioners named Colombia as a defendant on a veil-piercing theory. *See, e.g.*, JA 0022, ¶ 42. Again, the D.C. Circuit's disposition of the case made it unnecessary for that court to address whether petitioners could enforce the award against Colombia.

[6] The district court had jurisdiction over the enforcement action pursuant to 28 U.S.C. § 1330(a) (establishing subject matter jurisdiction for actions against foreign states, absent immunity) and § 1605(a)(6) (creating exception to immunity for actions to enforce arbitral awards).

A later-executed arbitration convention, the Inter-American Convention on International Commercial Arbitration (the "Panama Convention," App. 91-96), formally applies to the parties' dispute because of a "tiebreaker" provision involving the citizenships of the parties. *See* 9 U.S.C. § 305. The relevant provisions of the New York and Panama Conventions are substantively identical; both the district court and the Court of Appeals treated any distinction between the two as being legally insignificant and purported to apply the New York Convention. *See* App. 36 n.4; *id.* at 9-10 n.4. Accordingly, for simplicity this petition follows the lower courts and refers to the New York Convention throughout.

grounds that the Convention had deliberately abolished, and an enforcement court could not defer to that decision without violating the Convention. Whatever else might guide an enforcement court's discretion in deciding whether to defer to a foreign nullification decision, if that decision directly contradicts the Convention's terms the balance should tip heavily (if not dispositively) against deference. *See, e.g.*, Br. for Appellants at 28; Corr. Reply Br. for Appellants at 4-7.

Neither the district court nor the appellate court even addressed this argument. Instead, in the decision challenged in this petition, the D.C. Circuit focused solely on whether the nullification action before the Council of State was procedurally "tainted." Finding that there was no evidence of such "taint," the circuit court considered itself bound to defer to the Council's decision and refused enforcement. *See* App. 3 ("Because there is nothing in the record here indicating that the proceedings before the Consejo de Estado [Council of State] were tainted or that the judgment of that court is other than authentic, the District Court was, as it held, obliged to respect it.").

Accordingly, the questions presented in this petition are straightforward:

- First, when asked to enforce an arbitral award that has been nullified by a foreign court, is a United States enforcement court's role limited to deciding whether the proceedings in the foreign court were "tainted," with absolutely *no* consideration of the substantive grounds for the foreign court's decision? Or does the Convention require enforcement courts to undertake at

least *some* substantive analysis of the foreign decision—in particular, to determine whether the grounds for nullification may be ratified by an enforcement court without violating the Convention's terms?

- Second, should a United States enforcement court defer to a foreign nullification decision where that decision is based on grounds that the New York Convention expressly excludes as a defense to enforcement?

II. REASONS FOR GRANTING THE WRIT

The issues presented in this petition are best understood in light of the history of the international arbitration regime and the treaties enacted to support that regime.

A. International Arbitration Before the New York Convention

Businesses undertaking ventures in foreign nations frequently are concerned that those nations' courts may not provide fair forums to resolve their disputes. Many foreign venturers address this concern by entering into arbitration agreements in order to avoid being subjected to those courts' jurisdiction. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) ("As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade."); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) (enforcing an international arbitration agreement):

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties . . . .

Historically, the benefits of these agreements were often more theoretical than real. National courts proved reluctant to yield control of dispute resolution, and the early regime—set forth in the Convention on the Execution of Foreign Arbitral Awards (the "Geneva Convention," App. 71-80)—did not require them to do so. In particular, the very courts that these foreign venturers sought to avoid had the ultimate authority over arbitral awards rendered within their jurisdictions. Under the Geneva Convention, no court could enforce an award that had not first been judicially confirmed by a court in the forum state.[7] This "veto power" held by national courts obviously undermined the real value of international arbitration agreements.

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[7] *See* Geneva Convention, art. 1(d) (providing that an award could only be enforced if it had "become final in the country in which it ha[d] been made"); *see also, e.g., Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 367 n.41 (5th Cir. 2003) (explaining that this provision had been "interpreted to mean that a court of the country of origin had to give leave to allow enforcement").

Individual nations also were reluctant to yield control over arbitration procedures. Under the Geneva Convention, an award was enforceable only if the procedures observed by the parties followed *both* the forum state's procedural law *and* any additional requirements set forth in the parties' agreement. *See* Geneva Convention, art. 1(d). This drastically limited the parties' ability to contractually select their own arbitration procedures.

It is widely recognized that these features of the Geneva Convention were serious impediments to the creation of a robust, reliable international arbitration regime. *See, e.g.*, Jan Paulsson, *The Case for Disregarding LSAs (Local Standard Annulments) Under the New York Convention*, 7 Am. Rev. Int'l Arb. 99, 105 (2006) ("Whenever the arbitral venue was in one of the litigants' home jurisdiction, the Geneva system put the process at the ultimate mercy of the procedural requirements (or even partiality) of that party's courts—the very thing international arbitration is intended to avoid."); A. Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 6-7 (1981) (describing the Geneva regime's weaknesses). Accordingly, a second international convention, the New York Convention, was executed in 1958. *See* App. 81-90; *see also* 9 U.S.C. § 201 (implementing the Convention).[8] It is this Convention,

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[8] The United States acceded to the Convention in 1970, and Colombia followed in 1979. *See* United Nations Commission on International Trade Law, *Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2007), *at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

and the changes it made from the Geneva Convention, that are at the heart of this case.

B. The New York Convention Reduced the Control of National Governments and Courts over Awards Rendered in Their Territories.

The signatories to the New York Convention made sweeping changes to the international arbitration regime. Two of these are particularly relevant here.

First, the new Convention removed the forum-state court's stranglehold over an arbitral award. It eliminated the Geneva Convention's requirement that an award be judicially confirmed in the host nation before being enforced elsewhere. It also gave enforcement courts the discretion to enforce awards that had been nullified in forum states. *See* N.Y. Convention, art. V(1) (providing that enforcement of an award "*may* be refused . . . if [among other grounds] [t]he award . . . has been set aside by a competent authority of the country in which, or under the law of which, that award was made") (emphasis added); Paulsson, *supra*, at 102 ("The conditional 'may' leaps out at any lawyer. . . . '[M]ay' necessarily contemplates 'may not' . . . ."); *cf. Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 369 (5th Cir. 2003) ("As an enforcement jurisdiction, our courts have discretion under the Convention to enforce an award despite annulment in another country . . . ."); *id.* at 370 ("[T]he [foreign] annulment only has an effect here to the extent that our courts chose [*sic*] to recognize it.").

Second, the New York Convention created a new, internationally enforceable right to party-chosen

procedures by eliminating any requirement that the parties follow the procedural law of the forum state. Under the new Convention, forum procedural law may be consulted only where the parties did not prescribe their own procedures. *See* N.Y. Convention, art. V(1)(d) (allowing courts to refuse to enforce awards if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, *or, failing such agreement*, was not in accordance with the law of the country where the arbitration took place") (emphasis added). This is widely viewed as a significant improvement over the Geneva Convention. *See, e.g.*, Domenico Di Pietro & Martin Platte, *Enforcement of International Arbitration Awards* 163 (2001) (noting that the New York Convention "clearly establishes the supremacy of party autonomy" because "[o]nly in the absence of an agreement by the parties can the law of the place where the award was made be consulted"); van den Berg, *supra*, at 8 (characterizing this change as an "improvement in comparison to the Geneva Convention of 1927").[9]

C. The New York Convention Strengthened the Role of the Enforcement Court.

These improvements gave enforcement courts an increased role, especially in situations where they were asked to enforce awards "nullified" by forum-state courts. By giving enforcement courts the discretion to override nullification decisions, the Convention's drafters ensured

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[9] *See also, e.g.*, U.N. Doc. No. E/Conf. 26/SR.25, at 2 (1958) (statement by the president of the conference that the new convention "gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedure").

that forum-state nullification would no longer be the last word. In light of the changes introduced by the New York Convention, it is clear that an enforcement court now must consider whether deference to a foreign nullification decision is consistent with the Convention. Although this does not necessarily entail *de novo* review, an enforcement court must apply sufficient scrutiny to evaluate, at a minimum, whether nullification on the stated grounds violates the Convention's text or policies.

Courts in the United States and elsewhere have enforced awards notwithstanding forum-state nullifications. *See, e.g.*, *Karaha*, 335 F.3d at 367 n.43 (citing authorities). Prior to the D.C. Circuit's *TermoRio* decision, however, there was no clearly defined rule regarding how courts should determine whether to defer to or disregard such nullifications.

D. The Court of Appeals Ruled that It Must Defer to the Colombian Decision Absent a Showing that the Colombian Court Action Was Procedurally "Tainted."

The present case is precisely the type for which the Convention's provisions, and in particular the removal of the home state's "veto power," were designed. First, the business context at issue—a contract between a foreign venturer and the home-state government itself—epitomizes the situation in which an arbitration agreement may be perceived as necessary to ensure a fair resolution of any dispute. Accordingly, the New York Convention's enhanced protection of the international arbitration regime was particularly relevant here.

Additionally, the Colombian Council of State's nullification decision was explicitly based on grounds that directly contradicted the Convention's express terms. The Council nullified TermoRio's arbitral award on grounds based in the Colombian law of arbitration procedure—despite the Convention's clear statement that local procedural law may not be consulted where, as here, the parties have selected their own procedures. Accordingly, the United States enforcement court had a responsibility to determine whether deference to the Colombian nullification decision would be consistent with the Convention.

The D.C. Circuit, however, entirely abdicated its responsibility to consider the substance of the Council's decision. Instead, it focused solely on whether the proceedings before the Council were "tainted." Finding that there was no evidence of such a "taint," the court summarily deferred to the Council's decision—without *any* consideration of whether such deference was consistent with the Convention's text or policies. *See* App. 3 ("Because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic, the District Court was, as it held, obliged to respect it.").[10]

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[10] The court's reference to the "authenticity" of the judgment appears to refer solely to the technical fact that the document purporting to be the Council's judgment was in fact that judgment. Accordingly, the Court's reference to "authenticity" adds nothing significant to the deference analysis.

E. The D.C. Circuit's Rule Drastically Undercuts the Enforcement Court's Role and Would Return International Arbitration to the Geneva Convention Regime.

The D.C. Circuit's holding—that a foreign nullification decision must be deferred to, regardless of its substantive basis, unless the proceedings were "tainted"—seriously undermines several of the pro-enforcement principles embodied in the New York Convention.

The execution of the Convention was a deliberate attempt "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk* , 417 U.S. at 520 n.15. The drafters allowed for nonenforcement only in certain carefully defined circumstances, and—in a deliberate and significant change from the Geneva Convention—ensured that valid awards could be enforced in the courts of signatory states with or without the forum state's blessing.[11] By expressly refusing even to consider the substance of the Colombian nullification decision, and thus allowing Respondents to evade enforcement of an award that under the Convention should have been enforced, the D.C. Circuit effectively read these key advances entirely out of the Convention.

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[11] *See, e.g., Karaha*, 335 F.3d at 366-67 (explaining that "one of [the Convention's] main purposes was to facilitate the enforcement of arbitral awards by enabling parties to enforce them in third countries without first having to obtain either confirmation of such awards or leave to enforce them from a court in the country of the arbitral situs"; also noting that "an American court and courts of other countries have enforced awards, or permitted their enforcement, despite prior [foreign] annulment").

The result of the D.C. Circuit's rule would be a bizarre international "race to the courthouse." A losing arbitrant with a purported defense to enforcement that the Convention expressly forbids would have every incentive to launder that defense through a forum-court proceeding before the arbitral victor could initiate an enforcement action. Then, the enforcement court would automatically (absent procedural "taint" in the nullification action) defer to that nullification decision. The losing arbitrant could thus defeat enforcement of the award using a defense that the Convention explicitly eliminates. It is unlikely that this is what the Convention's drafters and signatories intended. *Cf. Scherk* , 417 U.S. at 516-17 (noting that "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate [the contracting parties'] purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages").[12]

In short, the D.C. Circuit's rule would defeat the purposes of the New York Convention's primary advances. Under the New York Convention, unlike its predecessor,

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[12] This does not necessarily mean that the basis of a forum-state nullification decision must precisely match one of the Convention's enumerated defenses in order for an enforcement court to defer to that decision. Art. V(1)(e) provides that a foreign nullification decision *may* justify nonenforcement, and the drafters may have intended this subsection to leave room for enforcement courts to "ratify" certain non-Convention defenses relied upon by forum-state courts. If the defense relied upon by the forum-state court is consistent with the Convention's general pro-enforcement bias and—more importantly—does not transgress boundaries specifically set forth in the Convention, deference may be appropriate. By contrast, where the Convention explicitly sets forth the requirements for a particular defense, and the forum-state court nullifies an award based on that defense despite the losing arbitrant's failure to satisfy those requirements, deference is obviously inappropriate.

an international venturer was supposed to have some confidence that should its transaction go sour, the courts it had sought to avoid would not have final power over the resulting dispute. In particular, if a forum-state court nullified an arbitral award on grounds inconsistent with the Convention, this would not be the end of the road—the foreigner could go to another signatory forum that would honor its obligations and enforce the award.

Such confidence is only justified if the courts of signatory states fulfill their obligations to confirm that nullification decisions are consistent with the Convention before deferring to them. Otherwise, a foreign venturer finds itself in TermoRio's current situation—with a validly won arbitral award that no court will consider because the forum-state court has exercised its power to defeat it.

F. The Court of Appeals Should Have Considered the Substantive Basis of the Council's Decision, Which Cannot Be Deferred to Without Violating the Convention.

The facts of the present case illustrate the flaws in the D.C. Circuit's rule. Even the most cursory review of the Council of State's nullification decision reveals that that decision was based on a defense expressly eliminated by the Convention's drafters, such that a United States court cannot defer to the Council's decision without violating its own Convention obligations.

The key Convention provision at issue was article V(1)(d), which applies where a losing arbitrant seeks to nullify an arbitral award on procedural grounds. As discussed *supra*, in the pre-Convention era this defense would succeed unless the procedure followed in the

arbitration was consistent with *both* the domestic law of arbitration procedure in the forum state *and* any additional requirements agreed to by the parties. Accordingly, prior to the New York Convention parties had no internationally enforceable right to choose arbitration procedures that differed from those set forth in the forum state's domestic law.

One of the Convention's key advances specifically targeted this constraint. The new procedure-based defense to enforcement of an arbitral award provides that a court may decline enforcement if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, *or, failing such agreement*, was not in accordance with the law of the country where the arbitration took place." Convention, art. V(1)(d) (emphasis added).

Accordingly, "[*o*]*nly in the absence of an agreement by the parties* can the law of the place where the award was made be consulted." Di Pietro & Platte, *supra*, at 163; *see also, e.g.*, Paulsson, *supra*, at 105-06 ("Article V(1)(d) of the New York Convention allows the arbitral procedure to be defined by the parties alone; national law comes into play only with respect to procedural issues not covered by their agreement."). In other words, a losing arbitrant now *cannot* seek to nullify an award if the arbitration procedures followed matched those set forth in the parties' agreement—regardless of whether those procedures were in accord with the forum state's procedural law. As discussed *supra*, this was viewed as one of the New York Convention's most important advances.

But this major advance is entirely nullified if an enforcement court allows it to be swallowed by a separate Convention provision, as the D.C. Circuit did here. That separate provision is article V(1)(e), which *permits* (but does not require) an enforcement court to refuse enforcement if the award "has been set aside by a competent authority of the country in which, or under the law of which, that award was made."

As interpreted by the D.C. Circuit, article V(1)(e) effectively overrides the carefully drafted terms of the other defenses in article V. Under that court's rule, article V(1)(e) allows a losing arbitrant to evade enforcement using a forbidden defense merely by "laundering" that defense through a forum-state nullification proceeding.

As a particularly relevant example, the Convention establishes specific requirements for a defense to enforcement based on alleged procedural defects in the arbitration. If the parties specified their own procedures by contract, the losing arbitrant must show that *those* procedures were not followed; a defense alleging that the forum state's procedural law was not followed will not be entertained. The elimination of the forum-state procedural law defense in such cases was deliberate, and was indeed one of the key features of the New York Convention.

But what if the forum court nonetheless nullifies the award based on a violation of forum-state procedural law? Should an enforcement court defer to that nullification decision under article V(1)(e), when it clearly could not have made the same decision itself in light of article V(1)(d)?

Unless the Convention's provisions are interpreted to directly contradict one another, the answer must be no. It cannot reasonably be contended that the Convention's drafters intended a losing arbitrant to be able to do through one provision what another provision expressly forbids it from doing. *Cf., e.g., Memphis & C.R. Co. v. Gaines*, 97 U.S. 697, 704 (1878) (describing the "cardinal rule of construction, which requires that the different provisions of a statute should, if possible, be reconciled, so as to make the whole consistent and harmonious"). Accordingly, article V(1)(e) must be read in light of the Convention's other terms, so that where a foreign nullification is based on grounds directly contrary to the Convention, an enforcement court should not defer to that nullification.

The facts of the present case illustrate the necessity of reading article V(1)(e) together with article V(1)(d). It was undisputed below that the parties to the arbitration chose their own arbitration procedures, and that the arbitration was conducted according to those procedures. Accordingly, had petitioners immediately instituted an enforcement action in a United States court, and had Respondents raised the defense that the arbitration was not conducted in accordance with Colombian procedural law, their defense would have been flatly rejected.

If the Convention's provisions are interpreted in harmony with one another, the result should be no different if the losing arbitrant manages to make the forbidden procedure-based defense in a forum-state court before the commencement of international enforcement proceedings. But according to the D.C. Circuit, that simple procedural step makes all the difference. A losing arbitrant can effectively launder the forbidden defense into

a valid one by first presenting it to a forum-state court in a nullification proceeding. If that court rules that the award is void because the parties did not follow forum-state procedural law—or equivalently, as here, that the parties' agreement was void *ab initio* because the parties exercised their right under the Convention to choose their own arbitration procedures—the losing arbitrant can successfully fend off enforcement of the award *as long as the nullification proceeding itself was not procedurally "tainted."*

It is highly unlikely that the Convention's drafters would have given so much attention to narrowing the forum-law procedure-based defense, and pointed to such narrowing as a major advance, if the only intended change was that now the losing arbitrant has to present that defense in a different forum—specifically, the very forum whose power the Convention's drafters sought to limit. It is similarly unlikely that the intended message to the international business community was: "You have a right to choose your own arbitration procedures—*unless* your adversary manages to institute a forum-state nullification proceeding before you bring an enforcement action." Indeed, such an interpretation of the drafters' and signatories' intentions exceeds the bounds of rationality. Yet that is exactly the D.C. Circuit's interpretation.[13]

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[13] For purposes of this analysis, a forum-state nullification based on the alleged invalidity of the parties' arbitration agreement, where (as here) the purported basis for invalidity is the specification of privately chosen procedures, is no different from a nullification based directly on a failure to follow the forum state's procedural law. While the Convention allows an enforcement court to decline enforcement if the underlying arbitration agreement is invalid, *see* N.Y. Convention, art. V(1)(a), this defense too must be read in light of the Convention's other provisions. A finding of

G. Certiorari Is Appropriate Here.

Supreme Court Rule 10(c) states that certiorari may be appropriate where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court."

Questions involving the deference to be given to foreign nullification decisions are "important question[s] of federal law." This Court has repeatedly recognized that a robust arbitration regime, free of inappropriate forum-state interference, is essential to supporting a healthy climate for international business ventures.[14] The resolution of the questions presented will significantly influence the United States' compliance with its treaty obligations under the New York Convention. By addressing those questions, this Court will enable members

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"invalidity" cannot be based on the parties' exercise of a right that the Convention expressly gives them.

[14] *See, e.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974):

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

See also, e.g., Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 631 (1985) (in light of the United States' accession to the New York Convention, "the emphatic federal policy in favor of arbitral dispute resolution . . . . applies with special force in the field of international commerce"); *id.* at 639 n.21 ("The utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own.").

of the international business community to gauge the degree to which they can trust in their arbitration agreements and transact in reliance on those agreements.

H. Individual Circuits Should Not Be Left to Gradually Develop Their Own Law on These Questions.

Finally, this is not an area in which this Court should wait for further development of the law at the circuit level. The New York Convention was enacted to stimulate international business by assuring foreign venturers that their private dispute resolution agreements would be honored and enforced. The D.C. Circuit's opinion in *TermoRio* will severely hinder this goal. Any competent legal adviser to these venturers must now tell them that, notwithstanding the Convention, there is a serious possibility that their arbitration agreements or awards will ultimately prove unenforceable. The very forum courts they seek to avoid will have essentially unfettered power to void their agreements or awards, and no United States court will step in to guarantee their Convention rights as long as the foreign nullification proceedings—regardless of their substance—are free of overt procedural "taint." In other words, these venturers will be exactly where they were before the New York Convention was signed, and the drafters' attempt to stimulate foreign commerce will be for naught. *Cf. Scherk*, 417 U.S. at 516-17 ("[T]he dicey atmosphere of [the] legal no-man's-land [that would result from inconsistent enforcement of arbitration agreements] would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.").

Moreover, the D.C. Circuit is the *only* circuit with jurisdiction over cases of the type at issue here, i.e., actions to enforce arbitral awards against foreign governments. Pursuant to 28 U.S.C. § 1391(f)(4), such actions may only be brought in the United States District Court for the District of Columbia. *See also Bettis v. Islamic Rep. of Iran*, 315 F.3d 325, 332 (D.C. Cir. 2003) (noting that the District of Columbia is the "dedicated venue for actions against foreign states"). Because the D.C. Circuit has appellate jurisdiction over all such cases, its *TermoRio* opinion is effectively the last word on the question of how—or, for that matter, *if*—United States courts will exercise their discretion in determining whether to defer to foreign decisions nullifying arbitral awards in cases involving foreign governments.

For all of these reasons, petitioners respectfully submit that this Court should intervene now to ensure that this nation's courts are faithful to their role under the New York Convention.

CONCLUSION

Under the New York Convention, the United States judiciary plays a critical supporting role in the international arbitration regime. Part of that role involves ensuring that members of the international business community are able to enforce arbitral awards that meet the Convention's standards. This is true even, and perhaps especially, when those awards have been improperly "nullified" by the forum courts that these venturers had sought to avoid by executing arbitration agreements.

The D.C. Circuit's rule—under which an enforcement court must defer to a foreign nullification

decision absent evidence of procedural "taint" in the nullification proceedings—conflicts with the United States' international obligations and would undermine the enforceability of international arbitral awards. This Court should accept review to replace that rule with one that is consistent with the New York Convention and the United States' obligations under it.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED, this 22nd day of August, 2007:

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487 F.3d 928

United States Court of Appeals,
District of Columbia Circuit.
TERMORIO S.A. E.S.P. and
LeaseCo GROUP, LLC, Appellants
v.
ELECTRANTA S.P., et al., Appellees.
No. 06-7058.

Argued Feb. 12, 2007.
Decided May 25, 2007.

Appeal from the United States District Court for the District of Columbia (No. 03cv02587).

Thomas R. Johnson, Jr. argued the cause for appellants. With him on the briefs were Stephanie K. Hines, Kevin M. Sali, and Benjamin Sharp.

Paul J. Kiernan argued the cause for appellees. With him on the brief was Stephen A. Bogorad.

Before: TATEL and GARLAND, Circuit Judges, and EDWARDS, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge EDWARDS. EDWARDS, Senior Circuit Judge.

Appellant TermoRio S.A. E.S.P. ("TermoRio") and appellee Electrificadora del Atlantico S.A. E.S.P. ("**Electranta**"), a state-owned public utility, entered into a Power Purchase Agreement ("Agreement") pursuant to which TermoRio agreed to generate energy and **Electranta** agreed to buy it. When appellee allegedly failed to meet its obligations under the Agreement, the parties submitted their dispute to an arbitration Tribunal in Colombia in accordance with their Agreement. The Tribunal issued an award in excess of $60 million dollars in

favor of TermoRio. Shortly after the Tribunal issued its award, **Electranta** filed an "extraordinary writ" in a Colombia court seeking to overturn the award. In due course, the Consejo de Estado ("Council of State"), Colombia's highest administrative court, nullified the arbitration award on the ground that the arbitration clause contained in the parties' Agreement violated Colombian law.

Following the judgment by the Consejo de Estado, TermoRio and co-appellant LeaseCo Group, LLC ("LeaseCo"), an investor in TermoRio, filed suit in the District Court against **Electranta** and the Republic of Colombia seeking enforcement of the Tribunal's arbitration award. Appellants contended that enforcement of the award is required under the Federal Arbitration Act, 9 U.S.C. § 201 ("FAA"), which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, *reprinted in* 9 U.S.C. § 201 (historical and statutory notes) ("New York Convention"). The District Court dismissed LeaseCo as a party for want of standing, dismissed appellants' enforcement action for failure to state a claim upon which relief could be granted, and, in the alternative, dismissed appellants' action on the ground of *forum non conveniens*. *TermoRio S.A. E.S.P. v. Electrificadora Del Atlantico S.A. E.S.P.*, 421 F.Supp.2d 87 (D.D.C.2006).

We affirm the judgment of the District Court. The arbitration award was made in Colombia and the Consejo de Estado was a competent authority in that country to set aside the award as contrary to the law of Colombia. *See* New York Convention art. V(1)(e) ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked . . . if that party furnishes . . . proof that: . . . [t]he award . . . has been set

aside . . . by a competent authority of the country in which, or under the law of which, that award was made."). Because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic, the District Court was, as it held, obliged to respect it. *See Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir.1999). Accordingly, we hold that, because the arbitration award was lawfully nullified by the country in which the award was made, appellants have no cause of action in the United States to seek enforcement of the award under the FAA or the New York Convention.

I. Background

The facts in this case are carefully set forth in the District Court's published Memorandum opinion. *See TermoRio,* 421 F.Supp.2d at 89-91. Because the facts relevant to this appeal are undisputed, we have incorporated significant portions of the District Court's statement as a part of our Background section.

Defendant Republic of Colombia is a foreign state. Defendant [**Electranta**], incorporated in 1957 to provide electricity services in and around Barranquilla, Colombia, was 87% owned and controlled by Colombia. Consequently, it is an agency or instrumentality of Colombia within the meaning of the Foreign Sovereign Immunities Act (28 U.S.C. § 1603(b)).

In the mid-1990s, Colombia's Atlantic coast experienced significant electricity shortages. In 1995 LeaseCo entered into discussions with **Electranta** to modernize **Electranta's** operations and build a new power plant in Colombia. A year later, LeaseCo and **Electranta** formed

two Colombian entities seriatim: first, Coenergia, and then TermoRio. Coenergia owned 99.9% of all shares of TermoRio. Initially, LeaseCo and **Electranta** owned roughly equal shares of Coenergia, so that they accordingly owned roughly equal shares of TermoRio. However, at the time of **Electranta's** complaint (in June 2004), LeaseCo and **Electranta** were transferring sole ownership of the 99.9% of the shares of TermoRio to LeaseCo.

At the heart of this lawsuit is [the Agreement] between TermoRio and **Electranta** [executed] in June 1997. Under this Agreement, TermoRio agreed to generate energy and **Electranta** agreed to buy it. In reliance on this Agreement, TermoRio invested more than $7 million to construct a power plant. The Agreement also provided that any dispute between the parties would be resolved by binding arbitration in Colombia.

However, in March 1998, Colombia announced a plan to sell the assets of all its Atlantic Coast utilities, including **Electranta**, to private owners and other Colombian utilities. On April 16, 1998, Colombia began to privatize by creating a new company, Electrocaribe, to receive and hold **Electranta's** assets and liabilities. However, at the behest of Colombia, **Electranta** did not transfer its duties under the Agreement to buy power from TermoRio. **Electranta** was left with obligations under the Agreement to buy power, but no resources to do so. As a result, **Electranta** failed to buy power from TermoRio and breached the Agreement. This breach of the Agreement, plaintiffs allege, had a direct effect in the United States affecting the extensive marketing of [Electrocaribe's] assets in the United States, by affecting the price of these assets, by causing United States purchasers to acquire a substantial

interest in these assets, and by eliminating any obligation for Electrocaribe . . . to fulfill the [Agreement].

. . . .

The Agreement's arbitration clause provides (as translated):

> Any dispute or controversy arising between the Parties in connection to the execution, interpretation, performance or liquidation of the Contract shall be settled through mechanisms of conciliation, amiable composition or settlement, within a term no longer than three weeks. If no agreement is reached, either party may have recourse to an arbitral tribunal that *shall be governed in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.* The tribunal shall be made up of three (3) members appointed by the Chamber, and shall be seated in the city of Barranquilla [, Colombia]. The award, which shall be binding on the parties, must be rendered within a maximum term of three months.

Pursuant to this provision, after defendants failed to meet their obligations under the Agreement, the parties entered into a long arbitration process. On December 21, 2000, a Tribunal of three arbitrators, applying ICC procedural rules, determined that **Electranta** breached the Agreement at the direction of Colombia. The Tribunal ordered **Electranta** to pay TermoRio an award of $60.3 million USD.

. . . .

Neither the Republic of Colombia nor **Electranta** has complied with the $60 million arbitral award, and both

have refused to pay any portion of it. Plaintiffs allege that Colombia and **Electranta** have also sought to undermine the award in several other respects.

> . . . [O]n December 23, 2000 (right after the Tribunal issued the award), **Electranta** filed an "extraordinary writ" with a court in Barranquilla, seeking to overturn the award. In response the Council of State vacated it. The Council of State reasoned that the arbitration had to be conducted in accordance with Colombian law, and Colombian law in effect as of the date of the Agreement did not expressly permit the use of ICC procedural rules in arbitration.
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> In . . . another action, plaintiff TermoRio filed two lawsuits in Colombian courts to rescind the transfer of **Electranta's** assets and to hold Colombia liable for breach of the Agreement. A Colombian court dismissed the first action on procedural grounds. The second count [was] still pending in the Colombian court system [as of March 17, 2006].

Id. at 89-90 (internal footnotes, quotation marks, and citations omitted).

In the District Court, appellants TermoRio and LeaseCo filed an Amended Complaint and Application for Confirmation and Enforcement of Arbitral Award and for Other Relief. The appellants initially alleged four causes of action: fraudulent conveyance, expropriation, an action to enforce the arbitration award, and breach of contract. By stipulation, however, the first two claims were dropped, leaving only the action to enforce the arbitration award and the breach of contract claim before the District Court. Appellees filed a motion to dismiss in which they raised numerous defenses, including, *inter alia,* that the award

was properly vacated by a Colombian court; that the District Court lacked subject matter jurisdiction by operation of the Foreign Sovereign Immunities Act and because the statute of limitations barred the suit; that the complaint should be dismissed under the doctrine of *forum non conveniens*; and that LeaseCo, an American corporation not party to the Agreement, lacked standing to enforce the arbitral award.

The District Court, after hearing arguments on the motion and reviewing the submissions of the parties – which included supporting memoranda, affidavits, sworn declarations, and the decisions of the Colombian courts – granted appellees' motion to dismiss. The trial court ruled as follows:

> [A]n accompanying Order dismisses LeaseCo for lack of standing. The court lacks subject matter jurisdiction over plaintiffs' breach of contract claim both under the Foreign Sovereign Immunities Act and by operation of the applicable statute of limitations. Although the court has subject matter jurisdiction over the remaining arbitral award enforcement claim, it is dismissed for failure to state a claim; the Colombian courts have vacated the award. In the alternative, the order dismisses the complaint on the ground of forum non conveniens. In this light, defendants' remaining arguments regarding abstention, dismissal of Colombia as a party, and service of process on defendants need not be addressed.

Id. at 92. On appeal, appellants have abandoned their breach of contract claim.

Because it is clear and undisputed that TermoRio has standing to bring this lawsuit, we need not address the

standing of LeaseCo. *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C.Cir.1998) ("If one party has standing in an action, a court need not reach the issue of standing of other parties when it makes no difference to the merits of the case." (quoting *Ry. Labor Executives' Ass'n v. United States*, 987 F.2d 806, 810 (D.C.Cir.1993))). In addition, because we hold that the District Court properly dismissed appellants' enforcement action under Article V(1)(e) of the New York Convention, we find it unnecessary to determine whether the case might have been dismissed on the ground of *forum non conveniens*, the alternative basis announced by the District Court. Likewise, we find it unnecessary to address any presumptive veil-piercing claim asserted by appellants to allow suit against the Republic of Colombia or whether such a claim is barred by the relevant statute of limitations. The only issue of consequence before this court is whether the District Court erred in dismissing appellants' claim to enforce the disputed arbitration award.

II. Analysis

A. *Standard of Review*

This court reviews *de novo* the District Court's dismissal for failure to state a claim, *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C.Cir.2006). As to the alternative basis for dismissal announced by the District Court, "[w]e may reverse a *forum non conveniens* determination . . . only for a 'clear abuse of discretion.'" *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C.Cir.2005) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)); *see also Piper Aircraft*, 454 U.S. at 257, 102 S.Ct. 252 ("The *forum non conveniens* determination is committed to the

sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion. . . . ").

B. *The Applicable International Agreement*

As the District Court noted,

> [t]he United States has ratified and codified two Conventions that allow courts in one country to enforce arbitral awards rendered in other signatory countries. *See* Inter-American Convention on International Commercial Arbitration[, *opened for signature* Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245,] (the "Panama Convention") (reprinted after 9 U.S.C. § 301), and The Convention on the Recognition and Enforcement of Arbitral Awards (the "New York Convention") (reprinted after 9 U.S.C. § 201). Colombia is a signatory to both of these Conventions. The New York Convention provides that signatory nations are to recognize and enforce arbitral awards rendered in other nations. *See* New York Convention Art. III. However, enforcement of awards "may be refused" if, *inter alia,* they were set aside by a competent authority in the country in which the award was made. *See* New York Convention Art. V(1)(e).
>
> . . . .
>
> FN4. [Appellants] maintain that the Panama Convention applies to this dispute because a majority of the parties to the arbitration agreement are citizens of states that have ratified the Panama Convention. *See* 9 U.S.C. § 305(1). However, codification of the Panama Convention incorporates by reference the relevant provisions of the New York Convention (*see* 9 U.S.C. § 302),

> making discussion of the Panama Convention unnecessary.

TermoRio, 421 F.Supp.2d at 91 & n. 4. We need not decide whether 9 U.S.C. § 302 incorporates the New York Convention, as opposed to other provisions of law related to the New York Convention, because the relevant provisions of the Panama Convention and the New York Convention are substantively identical for purposes of this case and neither party challenges the District Court's analysis. We therefore resolve this matter with reference to and using the language of the New York Convention.

C. *The Validity of a Foreign Judgment Vacating an Arbitration Award*

The Supreme Court has recognized an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 631, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *see also Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (noting that where parties have seen fit to adopt arbitration clauses in their agreements, there is a "strong federal policy in favor of enforcing [them]"). "And at least since this Nation's accession in 1970 to the [New York] Convention, and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act, [9 U.S.C. §§ 201-208], that federal policy applies with special force in the field of international commerce." *Mitsubishi,* 473 U.S. at 631, 105 S.Ct. 3346 (internal citation omitted). "As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade." *Id.* at 638, 105 S.Ct. 3346. The Convention's purpose was to "encourage the

recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974). And, as the Court has noted, "[t]he utility of the [New York] Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own." *Mitsubishi,* 473 U.S. at 639 n. 21, 105 S.Ct. 3346.

The basic understanding of the New York Convention is that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the ... articles [of the Convention]." New York Convention, art. III. Under the Convention, "the critical element is the place of the award: if that place is in the territory of a party to the Convention, all other Convention states are required to recognize and enforce the award, regardless of the citizenship or domicile of the parties to the arbitration." *Creighton Ltd. v. Gov't of the State of Qatar,* 181 F.3d 118, 121 (D.C.Cir.1999) (quoting Restatement (Third) of Foreign Relations LAW § 487 cmt. b (1987)).

Although its purpose is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts, the New York Convention enumerates specific grounds upon which a court may refuse recognition and enforcement of an arbitration award. On this point, Article V provides:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention art. V(1)-(2). These provisions of the Convention have been implemented by the FAA. *See* 9 U.S.C. § 207 ("The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.").

The Convention provides a carefully crafted framework for the enforcement of international arbitral awards. Under the Convention, "[o]nly a court in a country with primary jurisdiction over an arbitral award may annul that award." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir.2004) ("*Karaha Bodas II*"). As the Second Circuit has noted:

> the Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where

> recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief. *See* Convention art. V(1)(e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.

Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir.1997).

In this case, appellees point out that, because the arbitration award was made by a Colombian Tribunal convened in that country, pursuant to an agreement between Colombian companies to buy and sell electrical power in that country, Colombia is the nation with primary jurisdiction over this dispute. Appellees argue further that, under the clear terms of the Convention, appellants' action to enforce the arbitration award fails to state a cause of action. On this latter point, appellees point to Article V(1)(e) of the Convention, which provides that

> [r]ecognition and enforcement of [an] award may be refused, at the request of the party against whom it is invoked, . . . if that party furnishes . . . proof that: . . . [t]he award . . . has been set aside . . . by a competent authority of the country in which, or under the law of which, that award was made.

New York Convention art. V(1)(e). Pursuant to this provision of the Convention, a secondary Contracting State normally may not enforce an arbitration award that has

been lawfully set aside by a "competent authority" in the primary Contracting State. Because the Consejo de Estado is undisputedly a "competent authority" in Colombia (the primary State), and because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic, appellees contend that appellants have no cause of action under the FAA or the New York Convention to enforce the award in a Contracting State outside of Colombia. On the record at hand, we agree.

In reaching this conclusion, we generally subscribe to the reasoning of the Second Circuit in *Baker Marine,* 191 F.3d 194. In that case, Baker Marine, a barge company, executed a services contract with Danos, a shipping concern. The contract contained a clause requiring the parties to arbitrate disputes or controversies arising under their agreement. Following such a dispute, the parties "submitted to arbitration before panels of arbitrators in Lagos, Nigeria." *Id.* at 195. The panels awarded Baker Marine nearly $3 million in damages, but the award was subsequently set aside by a Nigerian court. Baker Marine then sought enforcement of the award in the United States District Court for the Northern District of New York. The trial court refused to recognize the award, citing Article V(1)(e) of the New York Convention, as well as principles of comity. On appeal, Baker Marine argued that the trial court erred in refusing to enforce the award, because it had been set aside by the Nigerian court on grounds that would have been invalid under U.S. law if presented in an American court. The appellate court rejected this argument and affirmed the trial court's decision not to recognize the award, noting that the parties "contracted in Nigeria that their disputes would be arbitrated under the

laws of Nigeria." *Id.* at 197. The court also remarked on the undesirable consequences that would likely follow from adoption of Baker Marine's argument:

> [A]s a practical matter, mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary "with enforcement actions from country to country until a court is found, if any, which grants the enforcement."

Id. at 197 n. 2 (quoting Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 355 (1981)). The same principles and concerns govern here, where appellants seek to enforce an arbitration award that has been vacated by Colombia's Consejo de Estado. For us to endorse what appellants seek would seriously undermine a principal precept of the New York Convention: an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully "set aside" by a competent authority in the State in which the award was made. This principle controls the disposition of this case.

D. *Considerations of "Public Policy"*

Appellants argue that courts in the United States "have discretion under the Convention to enforce an award despite annulment in another country," *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas,* 335 F.3d

357, 369 (5th Cir.2003), because Article V(1)(e) merely says that "[r]ecognition and enforcement *may* be refused" if the award has been set aside by a competent authority in the primary state, New York Convention art. V(1)(e) (emphasis added). More particularly, appellants contend that "a state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests." Appellants' Br. at 22 (quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines,* 731 F.2d 909, 931 (D.C.Cir.1984)). Appellants' characterizations of the applicable law are understated and thus misguided.

Appellants concede that *Baker Marine* is not incorrect in its holding that "it is insufficient to enforce an award solely because a foreign court's grounds for nullifying the award would not be recognized under domestic United States law." Appellants' Br. at 24. Rather, appellants allege that the District Court should have exercised its discretion to enforce the arbitration award in this case, because, *inter alia,* "the Council of State's decision was contrary to both domestic Colombian and international law; recognition of that decision would frustrate clearly expressed international and United States policy; and the process leading to the nullification decision demonstrated the Colombian government's determination to deny Plaintiffs fair process." *Id.*

In advancing their claims, appellants rely heavily on *In re Chromalloy Aeroservices,* 939 F.Supp. 907 (D.D.C.1996). In that case, the District Court addressed an arbitration agreement between the Egyptian Air Force and an American in which the parties provided that the losing party would not seek review of the arbitration award. While the American company's petition for enforcement of its award was pending before the District Court, Egypt

filed an appeal with the Egyptian Court of Appeal to nullify the award. The District Court refused to recognize the decision of the Egyptian court to nullify the award, finding that to do so would violate clear United States public policy in favor of arbitration and would reward Egypt's breach of the express contractual agreement not to take any appeal from the arbitration award. We need not decide whether the holding in *Chromalloy* is correct, because, as appellees point out, "the present case is plainly distinguishable from *Chromalloy* where an express contract provision was violated by pursuing an appeal to vacate the award. Here, Electranta preserved its objection that the panel was not proper or authorized by law, promptly raised it in the Colombian courts, and received a definitive ruling by the highest court on this question of law." Appellees' Br. at 13 (internal citation omitted).

Furthermore, appellants are simply mistaken in suggesting that the Convention policy in favor of enforcement of arbitration awards effectively swallows the command of Article V(1)(e). A judgment whether to recognize or enforce an award that has not been set aside in the State in which it was made is quite different from a judgment whether to disregard the action of a court of competent authority in another State. "The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief." *Yusuf Ahmed Alghanim & Sons,* 126 F.3d at 23; *see also Karaha Bodas II,* 364 F.3d at 287-88. This means that a primary State necessarily may set aside an award on grounds that are not consistent with the laws and policies of a secondary Contracting State.

The Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment of a court in a primary State, when the court in the primary State has lawfully acted pursuant to "competent authority" to "set aside" an arbitration award made in its country. Appellants go much too far in suggesting that a court in a secondary State is free as it sees fit to ignore the judgment of a court of competent authority in a primary State vacating an arbitration award. It takes much more than a mere assertion that the judgment of the primary State "offends the public policy" of the secondary State to overcome a defense raised under Article V(1)(e).

The decision in *Baker Marine* notes that the "[r]ecognition of the [foreign court's] judgment in [that] case d[id] not conflict with United States public policy," 191 F.3d at 197 n. 3, thus at least implicitly endorsing a "public policy" gloss on Article V(1)(e). However, the decision does not say that a court in the United States has unfettered discretion to impose its own considerations of public policy in reviewing the judgment of a court in a primary State vacating an arbitration award based upon the foreign court's construction of the law of the primary State. Rather, as appellees argue, *Baker Marine* is consistent with the view that, "[w]hen a competent foreign court has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary circumstances not present in this case." Appellees' Br. at 12.

In applying Article V(1)(e) of the New York Convention, we must be very careful in weighing notions of "public policy" in determining whether to credit the judgment of a court in the primary State vacating an

arbitration award. The test of public policy cannot be simply whether the courts of a secondary State would set aside an arbitration award if the award had been made and enforcement had been sought within its jurisdiction. As noted above, the Convention contemplates that different Contracting States may have different grounds for setting aside arbitration awards. Therefore, it is unsurprising that the courts have carefully limited the occasions when a foreign judgment is ignored on grounds of public policy.

> A judgment is unenforceable as against public policy to the extent that it is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought." *Tahan v. Hodgson,* 662 F.2d 862, 864 (D.C.Cir.1981) (quoting Rest.2d Conflict of Laws § 117, comment c (1971)). The standard is high, and infrequently met. As one court wrote, "[o]nly in clear-cut cases ought it to avail defendant." *Tahan,* 662 F.2d at 866 n. 17 (citing von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach,* 81 Harv. L. Rev.. 1601, 1670 (1968); Paulsen & Sovern, "*Public Policy" in the Conflict of Laws,* 56 Colum. L. Rev. 969, 980-81, 1015-16 (1956)). In the classic formulation, a judgment that "tends clearly" to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property is against public policy.

Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir.1986).

Article V(2)(b) of the Convention, unlike Article V(1)(e), incorporates an express public policy exception. Article V(2)(b) provides:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, art. V(2)(b). It is noteworthy that in construing this provision the courts have been very careful not to stretch the compass of "public policy." As one court has noted: Under Article V(2)(b) of the New York Convention, a court may refuse to recognize or enforce an arbitral award if it would be contrary to the public policy of that country. The public policy defense is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice.

Karaha Bodas II, 364 F.3d at 305-06 (internal citations and quotation marks omitted). Given that Article V(1)(e) contains no exception for public policy, it would be strange indeed to recognize such an implicit limitation in Article V(1)(e) that is broader than the express limitation in Article V(2)(b).

Accepting that there is a narrow public policy gloss on Article V(1)(e) of the Convention and that a foreign judgment is unenforceable as against public policy to the extent that it is "repugnant to fundamental notions of what is decent and just in the United States," *Tahan*, 662 F.2d at 864 (internal quotation marks omitted), appellants' claims still fail. Appellants have neither alleged nor provided any evidence to suggest that the parties' proceedings before Colombia's Consejo de Estado or the judgment of that court violated any basic notions of justice to which we subscribe.

Appellants contend that the Consejo de Estado's ruling conflicts with Colombia's obligation under the New York Convention, but that bare allegation surely provides no basis for us to ignore Article V(1)(e) on grounds of public policy. As the court noted in *Yusuf Ahmed Alghanim & Sons*:

> [U]nder the Convention, the power and authority of the local courts of the rendering state remain of paramount importance. "What the Convention did not do . . . was provide any international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration." [W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration,* 30 Tex.Int'l L.J. 1, 11 (1995).]. Another commentator explained:

Significantly, [Article V(1)(e)] fails to specify the grounds upon which the rendering State may set aside or suspend the award. While it would have provided greater reliability to the enforcement of awards under the Convention had the available grounds been defined in some way, such action would have constituted meddling with national procedure for handling domestic awards, a subject beyond the competence of the Conference.

> Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 70 Yale L.J. 1049, 1070 (1961). From the plain language and history of the Convention, it is thus apparent that a party may seek to vacate or set aside an award in the state in which, or

> under the law of which, the award is rendered. Moreover, the language and history of the Convention make it clear that such a motion is to be governed by domestic law of the rendering state. . . .

126 F.3d at 22-23.

The District Court correctly observed that "[t]his matter is a peculiarly Colombian affair," concerning, as it does, "a dispute involving Colombian parties over a contract to perform services in Colombia which led to a Colombian arbitration decision and Colombian litigation." *TermoRio,* 421 F.Supp.2d at 101, 103. To this, we would add that the parties also agreed to be bound by Colombian law. The Consejo de Estado, Colombia's highest administrative court, is the final expositor of Colombian law, and we are in no position to pronounce the decision of that court wrong.

E. *The District Court's Grant of Appellees' Motion To Dismiss*

Appellants have raised one final issue that warrants our attention. The District Court dismissed appellants' action under Federal Rule of Civil Procedure 12(b)(6), which provides that a suit may be dismissed on the pleadings for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Normally, dismissal is appropriate under Rule 12(b)(6) only if it is "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Broudy v. Mather,* 460 F.3d 106, 116-17 (D.C.Cir.2006) (internal quotation marks omitted) (discussing dismissal under Fed. R. Civ. P. 12(b)(6)). Appellants claim that the District Court erred in

granting the motion to dismiss under Rule 12(b)(6), because an affirmative defense only supports dismissal if that defense is unavoidably established by the facts alleged on the face of the complaint. Appellants argue that Colombia's nullification of the arbitration award is only grounds for a Rule 12(b)(6) dismissal if the nullification conclusively defeats appellants' claim. Application of Article V(1)(e) cannot be conclusive, appellants say, because, in their view, the New York Convention and United States law provide that an arbitration award can be enforced despite having been nullified in the country in which it was issued. Thus, according to appellants, the District Court erred in dismissing their action under Rule 12(b)(6) solely on the basis of a foreign nullification.

The short answer to appellants' claim is that their reference to the requirements of Rule 12(b)(6) is misplaced. Chapter 2 of the FAA incorporates and codifies the New York Convention. 9 U.S.C. § 201. However, the statute makes clear that "[Chapter 1 of the FAA] applies to actions and proceedings brought under [Chapter 2] to the extent [Chapter 1] is not in conflict with [Chapter 2] or the Convention as ratified by the United States." *Id.* § 208. Chapter 1, in turn, states that "[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided." *Id.* § 6. Therefore, it appears that motions to enforce arbitral awards should proceed under motions practice, not notice pleading. Indeed,

> [o]ne of the clearest examples of the operation of Section 208 is its making motion practice under Section 6 applicable to proceedings under the [New York Convention]. Thus, an arbitration

> award under the Convention may be enforced by filing a petition or application for an order confirming the award supported by an affidavit. The hearing on such a petition or application will take the form of a summary procedure in the nature of federal motion practice.

3 Fed. Proc., L. Ed. § 4:183 (1999).

In light of the foregoing, it is clear that the District Court properly addressed appellants' application for enforcement of the arbitration award. The District Court reviewed appellants' application and appellees' response, reviewed the affidavits submitted by the parties in support of their respective positions, and, on the basis of that review, arrived at its judgment. This satisfied the District Court's obligation under the New York Convention and squared with the approach that has been endorsed by some of our sister circuits. *See, e.g., Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 46 (2d Cir.1994) ("Since [appellee] appropriately sought relief in the form of a motion, the court was not required to comply with the pleading requirements of Fed. R. Civ. P. 12(b)."); *O.R. Sec., Inc. v. Prof'l Planning Assocs.*, 857 F.2d 742, 745-46 (11th Cir.1988) (same); *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 335 & n. 2 (5th Cir.1976) (same).

Furthermore, we note that, even if we were to assess the District Court's action by reference to the rules of notice pleading, we would find no error. Where, as here, both parties had sufficient opportunity to present evidence beyond the pleadings, this court has the authority to convert a motion to dismiss under Rule 12(b)(6) to a grant of summary judgment under Federal Rule of Civil Procedure 56 and affirm the judgment of the District Court. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*,

452 F.3d 798, 805 (D.C.Cir.2006). Summary judgment under Rule 56 is appropriate where the pleadings and the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kingman Park Civic Ass'n v. Williams,* 348 F.3d 1033, 1041 (D.C.Cir.2003) (quoting Fed. R. Civ. P. 56(c)). Such is the case here.

Both parties had ample time to submit documents outside of the pleadings and did, in fact, submit such evidence. However, as noted by the District Court, appellants did not so much as allege that the proceedings in Colombia were repugnant to the public policy of the United States. *TermoRio,* 421 F.Supp.2d at 102. And during oral argument before this court, appellants conceded that they were in no way foreclosed from introducing additional evidence or materials to the District Court to support a challenge to the validity or integrity of the proceedings that took place in Colombia. On this record, given the undisputed facts and the command of Article V(1)(e) of the New York Convention, summary judgment is appropriate. We must honor the judgment of the Colombia court vacating the disputed arbitration award, because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were fatally flawed or that the judgment of that court is other than authentic.

III. Conclusion

For the foregoing reasons, the judgment of the District Court dismissing appellants' application for enforcement of the arbitration award is affirmed.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7058 **September Term, 2006**

TERMORIO S.A. E.S.P. AND
LEASECO GROUP, LLC,
APPELLANTS

v.

ELECTRANTA S.P., ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia (No. 03cv02587)

Before: Tatel and Garland, *Circuit Judges*, and Edwards, *Senior Circuit Judge*.

JUDGMENT

(Filed May 25, 2007)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was agued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court dismissing appellants' application for enforcement of the arbitration award is hereby affirmed,

in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

MANDATE Pursuant to the provisions of Fed. R. App.Pro.41(a)

ISSUED: 7/6/07

BY: /s/ *Michael C. McGrail*,
Deputy Clerk

ATTACHED: ___ **Amending Order**
___ **Opinion**
___ **Order on Costs**

Date: May 25, 2007

Opinion for the court filed by Senior Circuit Judge Edwards.

421 F.Supp.2d 87

United States District Court, District of Columbia.

TERMORIO S.A. E.S.P., et al., Plaintiffs,

v.

ELECTRIFICADORA DEL ATLANTICO S.A. E.S.P., et al., Defendants.

No. Civ.A. 03-2587(PLF).

March 17, 2006.

Benjamin S. Sharp, Perkins Coie, LLP, Washington, DC, Stephanie Kay Hines, Jeffrey C. Dobbins, Paul T. Fortino, Thomas R. Johnson, Jr., Perkins Coie, LLP, Portland, OR, for Plaintiffs.

Paul J. Kiernan, Stephen Allan Bogorad, Holland & Knight LLP, Washington, DC, for Defendants.

MEMORANDUM

OBERDORFER, District Judge.

Plaintiffs sue in this United States district court to enforce an arbitral award rendered in the Republic of Columbia, by Columbian arbitrators, pursuant to an agreement between Columbian companies to buy and sell electrical power in Columbia. Separate from the enforceability case before us, defendants and plaintiffs also brought suit against each other in Columbia; one of those cases is still pending.

Currently pending in this case is Defendants' Motion to Dismiss Plaintiffs' Amended Complaint.[1] For reasons explained below, the motion is granted, and plaintiffs' complaint is dismissed on the merits. In the alternative, the complaint is dismissed on the ground of forum non conveniens because Columbia is an adequate and a more appropriate forum for resolution of this case.

I. *The Complaint*

A. Background

Plaintiffs' Amended Complaint alleges the following facts. Plaintiff TermoRio is a public utility corporation, incorporated under the laws of the Republic of Columbia, with its principal place of business in Barranquilla, Columbia. Plaintiff LeaseCo Group, LLC is an Oregon corporation with its principal place of business in Portland, Oregon.

Defendant Republic of Columbia is a foreign state. Defendant Electrificadora del Atlantico S.A. E.S.P. ("Electranta"), incorporated in 1957 to provide electricity services in and around Barranquilla, Columbia, was 87% owned and controlled by Columbia. Consequently, it is an agency or instrumentality of Columbia within the meaning of the Foreign Sovereign Immunities Act (28 U.S.C. § 1603(b)).

In the mid-1990s, Columbia's Atlantic coast experienced significant electricity shortages. In 1995 LeaseCo entered into discussions with Electranta to modernize

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[1] This motion was transferred by consent to the undersigned for decision. *See* Dec. 5, 2005 Order.

Electranta's operations and build a new power plant in Columbia. A year later, LeaseCo and Electranta formed two Columbian entities seriatim: first, Coenergia, and then TermoRio. Coenergia owned 99.9% of all shares of TermoRio. Initially, LeaseCo and Electranta owned roughly equal shares of Coenergia, so that they accordingly owned roughly equal shares of TermoRio. However, at the time of Electranta's complaint (in June 2004), LeaseCo and Electranta were transferring sole ownership of the 99.9% of the shares of TermoRio to LeaseCo.

At the heart of this lawsuit is a Power Purchase Agreement between TermoRio and Electranta in June 1997 (the "Agreement"). Under this Agreement, TermoRio agreed to generate energy and Electranta agreed to buy it. In reliance on this Agreement, TermoRio invested more than $7 million to construct a power plant. The Agreement also provided that any dispute between the parties would be resolved by binding arbitration in Columbia.

However, in March 1998, Columbia announced a plan to sell the assets of all its Atlantic Coast utilities, including Electranta, to private owners and other Columbian utilities. On April 16, 1998, Columbia began to privatize by creating a new company, Electrocaribe, to receive and hold Electranta's assets and liabilities. However, at the behest of Columbia, Electranta did not transfer its duties under the Agreement to buy power from TermoRio. Electranta was left with obligations under the Agreement to buy power, but no resources to do so. As a result, Electranta failed to buy power from TermoRio and breached

the Agreement.[2] This breach of the Agreement, plaintiffs allege, "had a direct effect in the United States affecting the extensive marketing of [Electrocaribe's] assets in the United States, by affecting the price of these assets, by causing United States purchasers to acquires a substantial interest in these assets, and by eliminating any obligation for Electrocaribe and [Reliant] to fulfill the [Agreement.]" Compl. ¶ 22.

B. The Arbitration Clause in the Agreement

The Agreement's arbitration clause provides (as translated):

> Any dispute or controversy arising between the Parties in connection to the execution, interpretation, performance or liquidation of the Contract shall be settled through mechanisms of conciliation, amiable composition or settlement, within a term no longer than three weeks. If no agreement is reached, either party may have recourse to an arbitral tribunal that *shall be governed in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.* The tribunal shall be made up of three (3) members appointed by the Chamber, and shall be seated in the city of Barranquilla. The award, which shall be binding on the parties, must be rendered within a maximum term of three months.[3]

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[2] Thereafter, Columbia sold Electrocaribe's stock to, *inter alia*, a Houston company called Houston Industries Incorporated (now known as Reliant Energy HL & P).

[3] *See* Compl. ¶ 26 (emphasis added).

Pursuant to this provision, after defendants failed to meet their obligations under the Agreement, the parties entered into a long arbitration process. On December 21, 2000, a Tribunal of three arbitrators, applying ICC procedural rules, determined that Electranta breached the Agreement at the direction of Columbia. The Tribunal ordered Electranta to pay TermoRio an award of $60.3 million USD.

C. Defendants' "Attack" on the Arbitration Process

Neither the Republic of Columbia nor Electranta has complied with the $60 million arbitral award, and both have refused to pay any portion of it. Plaintiffs allege that Columbia and Electranta have also sought to undermine the award in several other respects.

First, in 1998, Columbia (through a governmental agency) filed an action with a trial court in Barranquilla, seeking to invalidate the Agreement. The Columbian trial court dismissed the suit. The Council of State – Columbia's highest administrative court – upheld the dismissal. However, in 2001, shortly after the Tribunal issued its opinion and award, the Council of State reconsidered its decision and permitted Columbia's suit to go forward.

In a separate action, on December 23, 2000 (right after the Tribunal issued the award), Electranta filed an "extraordinary writ" with a court in Barranquilla, seeking to overturn the award. In response the Council of State vacated it. The Council of State reasoned that the arbitration had to be conducted in accordance with Columbian law, and Columbian law in effect as of the date of the

Agreement did not expressly permit the use of ICC procedural rules in arbitration.

In yet another action, plaintiff TermoRio filed two lawsuits in Columbian courts to rescind the transfer of Electranta's assets and to hold Columbia liable for breach of the Agreement. A Columbian court dismissed the first action on procedural grounds. *See* Opp. 20. The second count is still pending in the Columbian court system. *See* Supp. Joint Briefing (Feb. 17, 2006). However, plaintiffs also state that in November 2005 TermoRio was liquidated and assigned its litigation rights to LeaseCo, and LeaseCo's attorney in Columbia resigned because of "out-of-court interferences." Moreover, in December 2005 LeaseCo "determined that it must withdraw the breach of contract action." Pltffs' Supp. Briefing (Feb. 17, 2006), at 1-2. To date, no evidence has been submitted that LeaseCo has done so.

Finally, according to the complaint:

> At various times following the issuance of the Arbitral Award, [Columbia] initiated frivolous criminal charges and investigations against individuals associated with the arbitration, including the manager of the TermoRio project, the attorney for TermoRio during the arbitration proceeding, the independent economic experts who testified as to damages in the arbitration proceeding, and a member of LeaseCo. These charges were not based upon a good faith interpretation and application of Columbian law but were brought in bad faith to intimidate persons who might support the Arbitral Award, and to create the perception among the Columbian public that the Arbitral Award was unfair and corrupt.

Compl. ¶ 36.

D. Plaintiffs' Claims

Based on these facts, plaintiffs alleged four causes of action. However, pursuant to stipulation, they subsequently dropped two claims (fraudulent conveyance and expropriation). *See* Opp. at 2 n. 2. The claims for (1) enforcement of the Arbitral Award pursuant to the U.S. Arbitration Act, 9 U.S.C. § 201 et seq.; and (2) breach of contract remain.

1. *Enforcement of the Arbitral Award*

Plaintiffs maintain that the award of the Columbian Tribunal is enforceable in this court because the United States and Columbian have signed agreements to enforce other nation's arbitral awards.

The United States has ratified and codified two Conventions that allow courts in one country to enforce arbitral awards rendered in other signatory countries. *See* Inter-American Convention on International Commercial Arbitration (the "Panama Convention") (reprinted after 9 U.S.C. § 301), and The Convention on the Recognition and Enforcement of Arbitral Awards (the "New York Convention") (reprinted after 9 U.S.C. § 201). Columbia is a signatory to both of these Conventions. The New York Convention provides that signatory nations are to recognize and enforce arbitral awards rendered in other nations. *See* New York Convention Art. III. However, enforcement of awards "may be refused" if, *inter alia*, they were set aside by a competent authority in the country in which the award was made. *See* New York Convention Art. V(1)(e).

Plaintiffs maintain in this court that the arbitral award in this case falls under both the New York and Panama Conventions,[4] and this court accordingly should enforce the Columbian award. Further, plaintiffs allege that Electranta falls under the Conventions because it is an alter ego of Columbia.

2. *Breach of Contract*

Plaintiffs also contend that Electranta violated the terms of the Agreement, and that TermoRio, in contrast, fully performed its obligations (to the extent feasible in light of Electranta's violations). Moreover, the actions of Columbia and Electranta in breaching the Agreement "were based in part upon and directly related to acts performed in the United States and had a direct effect in the United States." Compl. ¶ 47. As a result, plaintiffs claim the alleged breach of the Agreement cost them $60 million in lost profits, expenses and additional damages. *See id.* ¶ 48.

II. *Defendants' Motion to Dismiss*

On June 30, 2004, defendants moved to dismiss the complaint based on the following grounds: (1) LeaseCo should be dismissed as a plaintiff for lack of standing; (2) the court lacks subject matter jurisdiction by operation of

[4] Plaintiffs maintain that the Panama Convention applies to this dispute because a majority of the parties to the arbitration agreement are citizens of states that have ratified the Panama Convention. *See* 9 U.S.C. § 305(1). However, codification of the Panama Convention incorporates by reference the relevant provisions of the New York Convention (*see* 9 U.S.C. § 302), making discussion of the Panama Convention unnecessary

the Foreign Sovereign Immunities Act and because the statute of limitations barred the suit; (3) the court lacks personal jurisdiction because defendants were not adequately served; (4) the court should abstain from ruling in light of the pending lawsuit in Columbia; (5) the complaint should be dismissed on the ground of forum non conveniens; and (6) the complaint should be dismissed for failure to state a claim because the Columbian courts have nullified the award.

As explained below, an accompanying Order dismisses LeaseCo for lack of standing. The court lacks subject matter jurisdiction over plaintiffs' breach of contract claim both under the Foreign Sovereign Immunities Act and by operation of the applicable statute of limitations. Although the court has subject matter jurisdiction over the remaining arbitral award enforcement claim, it is dismissed for failure to state a claim; the Columbian courts have vacated the award. In the alternative, the order dismisses the complaint on the ground of forum non conveniens. In this light, defendants' remaining arguments regarding abstention, dismissal of Columbia as a party, and service of process on defendants need not be addressed.

A. LeaseCo's Standing

Defendants allege that LeaseCo lacks standing to bring its claims, because LeaseCo is merely a "stockholder of a stockholder" of the other plaintiff, TermoRio. LeaseCo was not otherwise a party to the Agreement, arbitration, or any of the actions commenced in Columbia. When courts are determining whether a shareholder's claims are derivative of the corporation's claims for standing purposes, they apply the law of the state of incorporation. *See*

Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 108-09 & n. 10, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991). Under Oregon law (the state of LeaseCo's incorporation), individual shareholders can bring suit if their claims are distinct from the claims that the corporation could bring. If the shareholders' claims are derivative of the corporation's claims, however, the shareholders lack standing to sue. *See Caplener v. U.S. Nat'l Bank of Oregon*, 317 Or. 506, 515, 857 P.2d 830 (1993). Shareholders may also bring suit if the corporation fails to sue for reasons other than a good-faith business judgment. *See Franchise Tax Bd. of Calif. v. Alcan Aluminium*, 493 U.S. 331, 336, 110 S.Ct. 661, 107 L.Ed.2d 696 (1990).

LeaseCo contends it has a direct and personal interest in the outcome. However, as plaintiffs themselves make clear, LeaseCo is suing only because it suffered harm as a shareholder of TermoRio, a reason insufficient for standing under *Caplener*. *See* Opp. Br. 57-58. That LeaseCo is, or has become, the sole shareholder does not change the analysis. *See Franchise Tax*, 493 U.S. at 333, 110 S.Ct. 661. Moreover, the subsidiary corporation (TermoRio) has brought suit and is a plaintiff in this litigation, so the *Franchise Tax* exception does not apply.

This conclusion is unaffected by the fact that, according to plaintiffs, TermoRio was liquidated on November 30, 2005 and its litigation rights assigned to LeaseCo. Despite this transaction, TermoRio remains a party for purposes of determining jurisdiction and the substantive rights of the parties. As the Federal Rules provide, "[i]n case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."

Fed.R.Civ.P25(c). There has been no such motion or court ruling here.

The foregoing considered, LeaseCo is before the court solely as a stockholder qua stockholder and lacks standing to bring suit against the defendants. Accordingly, the accompanying order dismisses LeaseCo as a party for lack of standing.

B. Subject Matter Jurisdiction

1. *Jurisdiction under Foreign Sovereign Immunities Act*

The plaintiffs contend that the court has subject matter jurisdiction over the defendants by operation of the Foreign Sovereign Immunities Act (28 U.S.C. § 1330(a)). This provision of the Act provides the sole basis for jurisdiction in any civil action against a "foreign state as defined in [28 U.S.C. § 1603(a)] . . . with respect to which the foreign state is not entitled to immunity either under [28 U.S.C. §§ 1605-1607] or under any applicable international agreement." *See Argentine Repub. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989); *BPA Int'l, Inc. v. Kingdom of Sweden*, 281 F.Supp.2d 73, 81 (D.D.C.2003) ("foreign state" includes instrumentalities of a foreign state).

Columbia is obviously a foreign state, and Electranta is concededly an instrumentality of Columbia. However, the sovereign immunity of states and their instrumentalities is subject to certain exceptions. *See* 28 U.S.C. §§ 1605(a). The relevant exceptions are addressed below, as applied to the arbitral award claim and to the breach of contract claim.

a. Arbitral Award Claim

The Foreign Sovereign Immunities Act provides that a foreign state is not immune from suit if

> the action is brought . . . to confirm an award made pursuant to[ ] an agreement to arbitrate, if . . . (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards . . .

28 U.S.C. § 1605(a)(6).

Defendants concede that both Columbia and the United States are parties to conventions providing for recognition of arbitral awards under certain circumstances. Yet defendants contend that the Columbian courts have vacated the arbitral award so that there is nothing to enforce and accordingly no basis for jurisdiction by operation of a sovereign immunity exception. However, a foreign court's vacatur of an arbitral award does not always control whether this court has jurisdiction over a matter. For example, the New York Convention (codified in U.S. law) provides that recognition of a foreign award *may* be refused if it has been nullified by a foreign court. *See* New York Convention Art. V(1)(e). To establish a rule that a U.S. court *must* dismiss a case because a foreign court nullified an arbitral award would violate the New York Convention provision. *See, e.g., In re Chromalloy Aeroservices,* 939 F.Supp. 907, 909 (D.D.C.1996) (jurisdiction exists under 28 U.S.C. § 1605(a)(6) when Egyptian courts nullified arbitral award). If a foreign court's decision automatically deprived a U.S. court of jurisdiction to consider the matter, then foreign judgments obtained

fraudulently, for example, would be unremediable in U.S. courts.

In addition, the Columbian defendants contend that this is a "purely domestic arbitration" in that it involves only Columbian parties. However, the law regarding enforcement of arbitral awards does not distinguish between foreign and domestic parties. The relevant inquiry is whether "the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6)(B). Moreover, under the New York Convention signatory states are to enforce foreign awards as well as domestic.[5] Accordingly, construing all allegations in favor of plaintiffs, there is subject matter jurisdiction in this court over the claim to enforce the arbitration award. The question remains whether there is subject matter jurisdiction over the breach of contract claim under the Foreign Sovereign Immunities Act.

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[5] The New York Convention expressly provides that it is applicable to all arbitral awards "not considered as domestic awards in the State where their recognition and enforcement are sought." "[N]ot considered as domestic awards," in turn, has been interpreted to include awards involving parties outside of the jurisdiction of the court that seeks to enforce it. *See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2nd Cir.1997); *see also Siderurgica Del Orinoco v. Linea Naviera De Cabotaje*, 1999 WL 632870, at *1, *4 (S.D.N.Y. Aug. 19, 1999) (court has jurisdiction over petition to compel arbitration under international conventions with respect to a contract "between a Venezuelan steel producer and a Venezuelan shipowner for the transportation of steel between Venezuelan ports.").

b. Breach of Contract Claim

Section 1605(a)(2) of the Foreign Sovereign Immunities Act provides that a foreign state is not immune from suit if

> the action is based upon [I] a commercial activity carried on in the United States by the foreign state; or [ii] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [iii] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

An action is "based upon" commercial activity "*only if that activity constitutes an 'element[ ] of a claim* that, if proven, would entitle a plaintiff to relief under his theory of the case.'" *Saudi Arabia v. Nelson,* 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) (citations omitted) (emphasis added). None of these three alleged bases creates jurisdiction here.

i. "Commercial activity carried on in the United States"

Plaintiffs argue that jurisdiction exists under the Foreign Sovereign Immunities Act based on commercial activities in the United States conducted by Electranta, the entity that was 87% owned by the Republic of Columbia and, for purposes of this analysis, presumably Columbia's alter ego.

Plaintiffs argue that the following commercial acts of Electranta and Columbia support the application of the commercial activities exception of the FSIA: "(a) the sale of

Electranta's assets to an American investor, (b) the marketing of these assets through a road show in the United States, and (c) negotiation and contractual obligations to United States investors breached by the sale of these assets to an American investor." Opp. at 29.

None of the three factual bases presented by plaintiffs constitutes an element of the claim of breach of contract. The decision to sell Electranta's assets was allegedly part of a Columbian privatization plan. It was fortuitous that the ultimate purchaser of Electranta's assets was American; it could have been any other nationality. Nor was marketing of the assets in the United States an activity that is an element of a claim. The alleged violation of the contract occurred because of the privatization plan; the road show was clearly not an element of the contract violation.

The third allegation of commercial activity is confusingly worded, although it appears to suggest that LeaseCo was harmed when Electrocaribe sold Electranta's assets to U.S. investors. LeaseCo is no longer a party. Moreover, as explained above, the fact that the sale was to an American investor is not an element of the contract breach claim. The identity of the purchaser of the assets is irrelevant.

ii. "An act performed in the United States in connection with a commercial activity of the foreign state elsewhere"

Plaintiffs essentially reargue the same points as above (indeed, it is not clear that plaintiffs intend to argue both § 1605(a)(2)(I) and § 1605(a)(2)(ii)). The flaw in the analysis is the same: none of the alleged commercial activities

constitutes an element of the claim of breach of contract. As a result, plaintiffs have failed to plead a commercial activity in the United States.

iii. "An act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States"

Plaintiffs attempt to establish a direct effect in the United States by arguing that Columbia's alleged "actions in planning to breach the contract and in breaching the contract" deprived U.S. shareholders of the value of their shares. Plaintiffs appear to be arguing that the loss suffered by LeaseCo constitutes a direct effect. However, LeaseCo lacks standing and is no longer a plaintiff in this proceeding, and accordingly any proposed effect on LeaseCo is irrelevant. Moreover, it has not gained jurisdiction because TermoRio transferred its litigation rights to it; TermoRio remains the sole plaintiff in this matter for jurisdictional purposes. *See* 6 Moore's Fed. Prac. § 25.30 (2000) ("Substitution has no effect on subject matter jurisdiction."); *cf. Burka v. Aetna Life Ins. Co.*, 87 F.3d 478, 482 (D.C.Cir.1996) (substitution of non-diverse party does not defeat jurisdiction). Although *Burka* held that jurisdiction cannot be *defeated* by substitution, by extension jurisdiction cannot be *created* by substitution either. This rule is based on the requirement that jurisdiction be established by the facts alleged in the complaint. *See Mollan v. Torrance*, 22 U.S. 537, 539, 9 Wheat. 537, 6 L.Ed. 154 (1824); *see also Freeport-McMoRan, v. K N Energy*, 498 U.S. 426, 429, 111 S.Ct. 858, 112 L.Ed.2d 951 (1991) ("diversity jurisdiction is to be assessed at the time

the lawsuit is commenced."); *Okla. Tax Comm'n v. Graham,* 489 U.S. 838, 840-41, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989). In *Saadeh v. Farouki,* 107 F.3d 52 (D.C.Cir.1997), the D.C. Circuit held that the corollary of the *Freeport* rule is that, if diversity does not exist when the complaint was filed, it cannot be created by a party's change in domicile. *Id.* at 57 (citations omitted).

Plaintiffs also seem to argue that the sale of the assets to American investors had a direct effect on the investors as well. However, when the cause of action is breach of contract, a "direct effect" means a "nontrivial" one which must "follo[w] as an immediate consequence of the defendant's activity." *Repub. of Argentina,* 504 U.S. at 618, 112 S.Ct. 2160 (citation, internal quotation marks, and ellipses omitted). "[T]he direct effect test is interpreted to require a clause in a contract mandating the fulfillment of contractual obligations *in the United States." Atl. Tele-Network v. Inter-Am. Dev. Bank,* 251 F.Supp.2d 126, 134 (D.D.C.2003) (emphasis in original). None of the alleged activities identified above (marketing Electranta's assets in the U.S. and the stock price paid by non-party purchasers) is a contractual obligation created by the Agreement. There is not a sufficient nexus between the Agreement and the United States, particularly when LeaseCo is no longer a party, to sustain a direct effect in the United States from defendant's alleged breach of the Agreement.

The case of *Goodman Holdings v. Rafidain Bank,* 26 F.3d 1143 (D.C.Cir.1994) is particularly instructive here. In that case Goodman Holdings, an Irish corporation, sought to recover $300,000 due on letters of credit issued by Rafidain Bank and Rasheed Bank, both of which were branches of the Iraqi government. The letters of credit drew primarily on accounts in the United States. The

district court dismissed the complaint for lack of subject matter jurisdiction, finding that there was an insufficient commercial nexus with the United States to sustain an exception to sovereign immunity. The court of appeals affirmed. As a threshold matter, the court held that a claim is "based upon" a commercial activity only if it is an element of plaintiff's claim for relief. *Id.* (quoting *Saudi Arabia v. Nelson,* 507 U.S. at 357, 113 S.Ct. 1471). Regarding the first exception to immunity (commercial activity in the United States), the court concluded that Goodman had "at most established a 'relationship' or 'connection' between its claim and the domestic commercial activity alleged here – Rafidain's maintaining accounts in United States banks and paying Goodman from those accounts." *Id.* at 1146. However, this connection did not meet the *Nelson* test of constituting an element of plaintiff's claim. *Id.*

The court also rejected the argument that the activities at issue caused a direct effect in the United States. For guidance the court looked to *Repub. of Argentina v. Weltover,* 504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). In that case, Argentina contracted to make bond payments into New York bank accounts. Argentina subsequently ended the payments and sought to reschedule the debt. In rejecting immunity for Argentina, the Court held that "[b]ecause New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 619, 112 S.Ct. 2160.

However, the *Goodman* court distinguished *Weltover* on a factual basis. In *Goodman,* there was no U.S. location

that was designated as the "place of performance" where money was supposed to have been paid by Rafidain. As the court held, "Rafidain might well have paid them from funds in United States banks *but it might just as well have done so from accounts located outside of the United States.*" 26 F.3d at 1146-47 (emphasis added). On this basis, the court found that using banks in the United States did not have a "direct effect" in this country.

Similarly, here the effect in the United States was not an "immediate consequence" of defendants' activities. Moreover, there was no contractual obligation in the United States, the breach of which had an effect here. This case is very similar to *Goodman* in that the connection to or effect in the United States is fortuitous.

Prevailing authority in this Circuit compels the conclusion that this court lacks subject matter jurisdiction over the breach of contract claim.

2. *Statute of Limitations*

As a separate ground for dismissal of the breach of contract claim, defendants argue that plaintiffs' claim is barred by the applicable statute of limitations. In the District of Columbia, courts apply the law of the forum to determine if a claim is barred by the statute of limitations, including in cases arising under the Foreign Sovereign Immunities Act. *See Gilson v. Repub. of Ireland,* 682 F.2d 1022, 1025 (D.C.Cir.1982). The statute of limitations for breach of contract claims is three years from "the time the right to maintain the action accrues." D.C.Code § 12-301(7) (2006). Defendants maintain that the three years has run. TermoRio filed suit in Columbia based on the same contract claim on July 27, 2000, more than three and

a half years before it filed suit here on December 19, 2004. *See* Mot. to Dismiss Am. Compl. Ex. 9 (Marquez Decl.) ¶¶ 4; 6. Thus, according to defendants, the contract claim is barred.

Plaintiffs do not contest these basic facts.[6] Instead, they maintain that there should be an equitable tolling of the statute of limitations. In support they cite *Chung v. U.S. Dept. of Justice,* 333 F.3d 273 (D.C.Cir.2003). *Chung* explained that equitable tolling applies when the plaintiff "despite all due diligence . . . is unable to obtain vital information bearing on the existence of his claim." *Id.* at 278 (internal quotation marks and citation omitted). Plaintiffs do not argue that they were prevented from obtaining vital information. Indeed, they filed suit on this same breach of contract claim in Columbia. This fact is fatal to their equitable tolling argument.[7]

C. Fails to State a Claim upon which Relief May Be Granted

Because the contract claim is dismissed for lack of subject matter jurisdiction, the only issue remaining is whether there is a basis to dismiss the motion to enforce the arbitral award. Defendants seek to dismiss this motion

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[6] *See* Mot Hearing Tr. (2/23/06), at 60 (the three-year statute of limitations in the District of Columbia "does present us with significant problems on our contract action, and we believe that we have set up reasons why there should be an equitable tolling of that, but we do not lightly cast off the statute of limitations on the contract claim.") (counsel for plaintiffs).

[7] Plaintiffs also cite *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965) to support their equitable tolling argument. *Burnett* concerned equitable tolling of a federal lawsuit while a state lawsuit was pending, and hence is inapplicable here.

for failure to state a claim upon which relief can be granted. They argue U.S. courts cannot enforce an arbitration award if it has been set aside by a competent tribunal in a foreign country.

There are very few cases that address the question of whether a U.S. court should enforce an arbitral award when a foreign court has nullified that same award. *See Chromalloy Aeroservices v. Arab Repub. of Egypt,* 939 F.Supp. 907 (D.D.C.1996); *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.,* 191 F.3d 194 (2nd Cir.1999); *Spier v. Calzaturificio Tecnica, S.p.A.,* 71 F.Supp.2d 279 (S.D.N.Y.1999). Although *Chromalloy* ultimately is distinguishable from this case in several key respects, it is noteworthy for establishing the analytic framework for the two subsequent cases.

1. Chromalloy

Chromalloy (a U.S. corporation) contracted with Egypt to service and supply Egyptian Air Force helicopters. This contract contained an arbitration clause, which provided that it was "understood that both parties have irrevocably agreed to apply Egypt [sic] Laws and to choose Cairo as seat of the court of arbitration. . . . The decision of the said court shall be final and binding and cannot be made subject to any appeal or other recourse." 939 F.Supp. at 912 (quoting Appx. E to Contract).

In December 1991, Egypt announced that it was terminating the contract. Chromalloy commenced arbitration proceedings. In apparent retaliation, Egypt drew over $11 million from Chromalloy's letters of credit. In August 1994, the arbitral panel ordered Egypt to pay Chromalloy over $17 million. *Id.* at 908.

After Egypt filed suit in Egypt to nullify the award, Chromalloy moved to enforce the award in this court. The court found jurisdiction over Egypt under the commercial activities exception to the Foreign Sovereign Immunities Act. *See id.* It recognized that the award was made in Egypt, under Egyptian law, and "has been nullified by the court designated by Egypt to review arbitral awards. Thus, the Court may, at its discretion, decline to enforce the award." *Id.*

However, the court noted that the New York Convention provides that it shall not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law . . . of the country where such award is sought to be relied upon." New York Convention Art. VII. In that light, the question was whether, in the absence of the Convention, the Federal Arbitration Act ("FAA") would have provided Chromalloy a means to enforce the arbitration award. It found that there was no basis under the FAA to set aside the award, and hence the award was enforceable. 939 F.Supp. at 909.

As a result, the court considered whether the decision of the Egyptian court should be recognized as a valid foreign judgment, particularly when the arbitration clause precluded judicial review. A U.S. court will enforce the judgment of a foreign court if there was proper service of process, and the "original claim [does] not violate U.S. public policy." *Id.* at 913 (quoting *Tahan v. Hodgson,* 662 F.2d 862, 864 (D.C.Cir.1981)). The district court found a "strong public policy" of enforcing binding arbitration clauses. Recognition of the Egyptian court's decision would violate this public policy. *Id.*

The court then considered if considerations of "international comity" compelled it to accept the foreign court's judgment. Somewhat anomalously, the court examined this question under the act of state doctrine, and relied on *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l,* 493 U.S. 400, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). In that case, the Court held that "the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. [However, t]hat doctrine has no application to the present case because the validity of no foreign sovereign act is at issue." *Id.* at 409, 110 S.Ct. 701. As a result, the district court held that the issue was whether it should give res judicata effect to the Egyptian court's decision, not whether the case was properly decided under Egyptian law. With the issue framed in this manner, the court concluded that its decision to not afford res judicata effect to the Egyptian court's decision was not a judgment about the Egyptian court's decision itself, but rather a decision to enforce the strong U.S. policy in favor of enforcing arbitral awards.

The court's decision in *Chromalloy* is both questionable on the merits and distinguishable on the facts. The question in *Chromalloy* was whether to enforce a foreign court's judgment, not whether (as in *Kirkpatrick*) it should abstain from passing judgment on a foreign state's actions. The policy bases behind enforcing foreign court judgments – reciprocity, avoiding forum shopping, and avoiding duplicative litigation – are not relevant in the context of *Kirkpatrick*.

More generally, the instant case is factually distinguishable from *Chromalloy* on several grounds. First, there is no longer a U.S. party involved in this case, as there was in *Chromalloy*. The lack of a U.S. party diminishes the U.S.

interest in applying U.S. law; indeed, the presence of a U.S. party in *Chromalloy* arguably was decisive.[8] Second, there is no jurisdiction under the commercial activities exception of the Foreign Sovereign Immunities Act in this case (*see supra* Part II.B.1.b.), as there was in *Chromalloy*. As a result, even assuming that one could set aside the New York Convention and look to the Federal Arbitration Act, this Court would lack jurisdiction to consider the matter. Third, the *Chromalloy* court seemed to rely heavily on the fact that Egypt sought "to repudiate its solemn promise to abide by the results of the arbitration" in breach of the contractual agreement that the arbitration decision "shall be final and binding and cannot be made subject to any appeal or other recourse." 939 F.Supp. at 912. Here, in contrast, the agreement did call for the arbitration to be "binding," but it did not expressly preclude judicial review, or say it was final.

Fourth and finally, although it is not mentioned by the *Chromalloy* court, the petitioners first filed suit in the United States, before Egypt filed suit in its own country. There is a strong policy preference for favoring the first-filed suit, including in the international context. *See Colorado River Water Conserv. Dist. v. United States,* 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); *Cont'l Time Corp. v. Swiss Credit Bank,* 543 F.Supp. 408 (S.D.N.Y.1982) (complaint should be dismissed in recognition that parties previously initiated litigation in Switzerland on

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[8] *See* Radu Lelutiu, "NOTE & COMMENT: *Managing Requests for Enforcement of Vacated Awards under the New York Convention*," 14 Am. Rev. Int'l Arb. 345, 355 (2003) (stating that the "court's analysis is filled with nationalistic partisanship" and "the decisive factor in the court's rationale was the citizenship of Chromalloy Aeroservices.").

the same set of issues). In this case, *Cont'l Time* counsels in favor of respecting the Columbian court's judgment, particularly when the matter has been fully litigated there and plaintiffs have filed suit there.

2. Baker Marine

The case of *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2nd Cir.1999) is more on point. There Baker Marine and Danos entered into a contract to provide barge services to Chevron in Nigeria. The contract included an arbitration clause. All parties (except Chevron, Inc.) were Nigerian, and the parties specified that Nigerian law should apply. Baker Marine charged Danos and Chevron with violating their respective contracts. Two sets of arbitrators were empaneled in Lagos, Nigeria. The first panel award Baker $2.23 million in damages against Danos; the second awarded Baker $750,000 against Chevron.

Baker promptly moved to enforce these awards in the Nigerian Federal High Court. Danos and Chevron appealed to the same court to vacate the awards. The Nigerian court set aside both arbitration awards on several grounds. In August 1997, Baker brought two actions in the Northern District of New York, seeking enforcement of the awards under the New York Convention. The lower court dismissed Baker's petitions, finding that "it would not be proper to enforce a foreign arbitral award under the [New York] Convention when such an award has been set aside by the Nigerian courts." *Id.* at 196.

On appeal Baker contended that reasons cited by the Nigerian courts would not be recognized under U.S. law as valid grounds for vacating an arbitral award. The court of

appeals rejected this argument, ruling that there was no evidence that the Nigerian courts acted contrary to Nigerian law. Moreover, as a policy matter it found that

> mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary "with enforcement actions from country to country until a court is found, if any, which grants the enforcement."

Id. at 197 n. 2 (citation omitted).

The Second Circuit also distinguished *Chromalloy,* upon which Baker apparently relied. The plaintiff in *Chromalloy* was a U.S. citizen; Baker was not. Moreover, Chevron and Danos did not violate any provision in the contract precluding judicial review, as in *Chromalloy.*

3. Spier

A third relevant case is *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F.Supp.2d 279 (S.D.N.Y.1999). In that case, Spier, an American citizen, contracted with Tecnica, an Italian corporation, to provide Tecnica with expertise to manufacture plastic footwear and ski boots in Italy. Their contract had an arbitration clause. A few years after signing the contract, the parties had a dispute, Spier invoked the arbitration clause, and an Italian arbitration panel awarded Spier one billion Italian lire plus 15% annual interest.

On November 20, 1995, Tecnica challenged the arbitral award in Italian courts. On June 23, 1996, Spier filed an action in the Southern District to enforce the award. The district court stayed consideration of the issue until the Italian litigation was completed. The lower Italian court then nullified the award. The Court of Appeals of Venice affirmed the judgment. The Supreme Court of Cassation, Italy's highest court. All three courts ruled that the arbitrators exceeded their authority by issuing an award based on an inferred agreement that was not contemplated by either party. Despite these rulings, Spier returned to the Southern District to enforce the award pursuant to the New York Convention.

The district court, in considering whether the Italian courts' decisions should be adhered to, discussed both *Baker Marine* and *Chromalloy.* The court noted that, as in *Chromalloy,* the plaintiff was a U.S. citizen and sought confirmation of the award in the United States. However, the court read *Baker Marine's* comments concerning Egypt's violation of its "solemn promise" to not appeal the arbitral award to be the "decisive circumstance" supporting the court's decision. As the district court explained, "[o]nly that circumstance is singled out as violating American public policy articulated in the [Federal Arbitration Act], thereby justifying the district court's enforcement of the Egyptian award." *Id.* at 287. Although acknowledging that the court's decision to defer to the Italian court's decisions was discretionary, it concluded that plaintiff provided "no adequate reason for refusing to recognize the judgments of the Italian courts." *Id.* at 288.

4. *Analysis and Conclusion*

As recited above, this case involves a dispute involving Columbian parties over a contract to perform services in Columbia which led to a Columbian arbitration decision and Columbian litigation. In consideration of these facts and the foregoing three cases, plaintiffs cannot seek to enforce their arbitral award here unless the Columbian courts' decisions violated U.S. public policy. *See Baker Marine,* 191 F.3d at 197 n. 3.

For a foreign court's decisions to be contrary to U.S. public policy, it must be "'repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.'" *Tahan v. Hodgson,* 662 F.2d 862, 864 (D.C.Cir.1981) (quoting Restatement (Second) Conflict of Laws § 117 cmt. c (1971)). "[W]hile the public policy doctrine is not moribund, it is in fact rarely relied upon. Only in clear-cut cases ought it to avail defendant." *Id.* at 866 n. 17 (citations omitted). In *Tahan,* plaintiff (an Israeli citizen) acted as the travel agent for defendant's company in Israel until a dispute arose and their relationship ended. Plaintiff obtained a default judgment in Israel against defendant for about $58,000, and sought to enforce the judgment in the United States. The district court denied the motion to enforce, on the ground that the foreign judgment was contrary to U.S. public policy. The court of appeals reversed. On appeal defendant argued that the Israeli court's judgment was unenforceable for three main reasons. First, he was not properly served because the original service papers were in Hebrew. Second, he did not receive a second notice at least three days prior to hearing and application for default judgment, as provided for in the Federal Rules of Civil Procedure. Third, the Israeli court did not provide a "compelling

justification" to pierce the corporate veil when it entered judgment against him personally. The appellate court found that these arguments were "by no means unreasonable." *Id.* at 866. Nevertheless, the court held that the Israeli court's decision – although at odds with U.S. law – was not "repugnant" to it and could be enforced.

Similarly, in *Ingenohl v. Olsen & Co.*, 273 U.S. 541, 47 S.Ct. 451, 71 L.Ed. 762 (1927), the Filipino Supreme Court considered whether to enforce a decision of the Hong Kong Supreme Court regarding a trademark dispute. The Filipino Court reviewed the foreign decision to see if was based on a "clear mistake of law or fact." Applying that standard, enforcement of the Hong Kong judgment was denied. The U.S. Supreme Court, on writ of certiorari to the Filipino Supreme Court, reversed. It held that the Hong Kong decision settled the rights of the parties in Hong Kong, and the Filipino Court should not have reviewed the decision under the "clear mistake of law or fact" standard. As the Court held, when a judge in Hong Kong "is the final exponent of [the relevant] law . . . we do not see how it is possible for a foreign court to pronounce his decision wrong." *Id.* at 544, 47 S.Ct. 451.

In this case, plaintiffs contend that the Columbian decisions violated U.S. public policy. Yet they had little trouble in deciding to litigate their breach of contract claim in Columbia. This action alone suggests considerable confidence and trust in the Columbian court system. They now have decided to withdraw their claim (after years of litigation) and their Columbian counsel is withdrawing. However, there is evidence that the withdrawal was due more to a strategic decision about the likelihood of success. *See* Letter from Chemas to Gold (Nov. 30, 2005) (Ex. C to Gold Decl. (Feb. 17, 2006)).

Nevertheless, plaintiffs rely on the declaration of Fernando Mantilla-Serrando, a Columbian lawyer also licensed to practice in New York, France, and Spain, to argue that the Columbian court's decision violated U.S. public policy. According to Mantilla-Serrano's own explanation, the Council of State ruled that the arbitration agreement, as amended by the parties on January 15, 1998, had an invalid object or purpose because it specified that the parties were to follow International Chamber of Commerce ("ICC") procedures. "The Court found this illegality based on the fact that on that date Columbian arbitration law did not allow the parties to a domestic arbitration to subscribe to arbitration that would proceed in accordance with the ICC Rules." Opp. Ex. 3 (Mantilla-Serrano Decl.) ¶ 4. He concedes that Columbian law did not allow the parties to incorporate ICC procedural rules, and he implicitly concedes that the correct law to apply is the law in existence when the Agreement was first amended (January 15, 1998).[9] Yet he maintains that the illegal procedural rules were not an "object or purpose" of the agreement under Columbian law; they were "ancillary." *See id.* ¶ 11. As a result of this and other errors, Mantilla-Serrano concludes that the Columbian court's explanation "can hardly be explained as anything other than a decision that was aimed at producing a particular result: nullification of the Termorio award." *Id.* ¶ 10.

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[9] As he explained, "the Court relied on a classic precept of the interpretation of contracts, Article 38 of Law 153 of 1887[ ], which states that '[e]very contract shall incorporate the laws in force on the date the contract is made.'" *Id.* ¶ 9.

Even assuming that Mantilla-Serrano's analysis is accurate, it falls far short of meeting the high standard required to preclude enforcement of a foreign judgment.

On a factual basis, as defendants note, if the Columbian court was reaching for *any* reason to nullify the award, it is illogical that it would first reject in detail defendants' other arguments for nullifying the award. *See, e.g.,* Mantilla-Serrano Decl. ¶ 5 n. 1 ("Electranta advanced numerous arguments for setting aside the Arbitral Award based on the ground that the arbitration agreement was invalid due to an illegal object, but it did not mention the ground ultimately relied on by the Council of State for its finding of illegal object or purpose of the arbitration agreement."). [10] Moreover, plaintiffs concede that they do not specifically allege that Columbian courts are corrupt. When asked at oral argument if there was evidence of corruption in the Columbian courts, counsel for plaintiffs stated, "we have our beliefs, Your Honor, but our beliefs are not evidence. We have not put in evidence of corruption . . . " Hearing Tr. (2/23/06) at 47.

On a legal basis, it takes much more than an allegation that a decision was results-oriented to demonstrate that it was "repugnant," particularly when, as here, the decision seems plausible on the merits. [11] Consistent with

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[10] Its decision to raise the issue sua sponte is hardly cause for alarm; U.S. courts have followed this practice as well. *See United States v. Duran*, 96 F.3d 1495, 1510 (D.C.Cir.1996); *Kelso v. U.S. Dep't of State*, 13 F.Supp.2d 1, 7 (D.D.C.1998).

[11] Plaintiffs also offer the Declaration of George A. Bermann, a Professor of Law at Columbia University. Professor Bermann's Declaration reviews the purpose and application of arbitration law both here in the United States and globally. It does not, however, provide any

(Continued on following page)

Ingenohl, a determination even that the Columbian court made a clear mistake is not sufficient to refuse to enforce it.

D. Forum Non Conveniens

For the foregoing reasons, plaintiffs' complaint is dismissed on the merits. In the alternative, the complaint – lacking virtually any connection to the United States – should be dismissed on the ground of forum non conveniens. This matter is a peculiarly Columbian affair, and should properly be adjudicated in that country.

Under *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981), courts employ a two-part test to determine if forum non conveniens will be invoked as a basis for dismissal. First, the party seeking dismissal on the basis of a purportedly inconvenient forum must show that an adequate alternative forum exists. *See id.* at 254 n. 22, 102 S.Ct. 252; *see also El-Fadl v. Central Bank of Jordan,* 75 F.3d 668, 676 (D.C.Cir.1996). If the party is able to meet that burden, the court then weighs the relevant public and private factors in favor and against litigation in either forum. *See id.* at 676, 679.

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further evidentiary support for the notion that the Columbian court's decision was contrary to public policy.

Similarly, plaintiffs provide the Declaration of Ivan L. Gold, an investor in LeaseCo. His Declaration states that he and two others have been preliminarily indicted for "procedural fraud." *See* Opp. Ex. 4 (Gold Decl.) ¶¶ 41-42. Aside from innuendo and arguments of counsel, there is no evidence that these indictments were without merit or designed to unduly influence those involved in the arbitration.

1. *Adequacy of Forum*

In determining whether a foreign state's forum is adequate, courts are not to place undue weight on the possibility of a change in substantive law. *See Piper,* 454 U.S. at 247, 102 S.Ct. 252. Nor is a foreign forum inadequate because of different adjudicative procedures or general allegations of corruption in the judicial system. *See El-Fadl,* 75 F.3d at 678.

Defendants assert that Columbia provides an adequate alternative forum for the plaintiffs' claims. First, plaintiffs' two remaining claims have already been litigated in Columbian courts, which demonstrates that defendants are subject to those courts' jurisdiction and that the courts are available to resolve the disputes. That the Columbian courts ultimately ruled against TermoRio does not render it an inadequate forum. Indeed, at least two courts have previously found that Columbian courts are adequate. *See In re: Ford Motor Co.,* 344 F.3d 648, 650, 652 (7th Cir.2003) (noting "everyone agreed" with district court finding that Columbian courts were adequate forum for product liability cases); *Iragorri v. Int'l Elevator,* 203 F.3d 8, 13-14 (1st Cir.2000) (upholding finding that Columbian courts were adequate forum for wrongful death action).

As discussed *supra,* plaintiffs' decision to use these very same Columbian courts to bring a breach of contract claim suggests very strongly that it is an adequate forum. Moreover, plaintiffs have presented no persuasive reason why Columbian courts are inadequate.

2. *Public and Private Factors*

Defendants argue that the public and private factors favor litigation in Columbia. First, although plaintiffs' choice of forum is given a strong presumption, that presumption "carries much less weight when the plaintiff is also a stranger to the forum." *BPA Int'l v. Kingdom of Sweden,* 281 F.Supp.2d 73, 85 (D.D.C.2003) (citing *Piper,* 454 U.S. at 256, 102 S.Ct. 252).

In balancing the private parties' concerns, courts consider "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). To determine the public interest, the courts look to the

> "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive." The public factors bearing on the question included the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Piper, 454 U.S. at 241 n. 6, 102 S.Ct. 252 (quoting *Gulf Oil,* 330 U.S. at 508-09, 67 S.Ct. 839).

Defendants argue that none of the private factors counsels in favor of litigating the case here. "Most, if not all, of the potential witnesses and evidence will likely be located in Columbia, and therefore will be beyond the reach of this Court's compulsory process. In addition, the cost of witness attendance will be very high if the case proceeds in Washington, D.C." Mot. at 33.

Defendants also contend that none of the public interest factors weighs in favor of D.C. either. No party still in the suit has a connection with Washington or the United States. Columbia, in contrast, has a strong interest in deciding this case, when the parties are all in Columbia, the relevant documents (in Spanish) are in Columbia, and the parties entered into an agreement in Columbia concerning a Columbian project.

Plaintiffs offer no persuasive rebuttal on the public/private interest factors analysis. Indeed, they concede that there will be difficulties in trying the case here. As counsel for plaintiffs stated at oral argument, "I will certainly admit that we are going to have a really interesting time proving our case. . . . If we can convince our witnesses to come up from Columbia, we're going to try to bring them, because convincing them will be difficult." Hearing Tr. (2/23/06), at 58.

Defendants' argument is persuasive. Therefore, this case is alternatively dismissed on ground of forum non conveniens.

III. Conclusion

For the foregoing reasons, an accompanying Order dismisses plaintiffs' complaint.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TERMORIO S.A. E.S.P., *et al.*,	)	Civil Action No.
Plaintiffs,	)	03-2587 (PLF)
v.	)	
ELECTRANTA [S.P.], *et al.*,	)	
Defendant.	)	

ORDER

Currently pending in the above-captioned case is Defendants' Motion to Dismiss Plaintiffs' Amended Complaint. For the reasons set forth in an accompanying memorandum, it is this 17th day of March, 2006, hereby:

ORDERED: that Defendants' Motion to Dismiss Plaintiffs' Amended Complaint [dkt no. 23] is GRANTED; and it is further

ORDERED: that Plaintiffs' Amended Complaint [dkt no. 19] is DISMISSED.

/s/

Louis F. Oberdorfer
UNITED STATE DISTRICT JUDGE

28 U.S.C. § 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate

State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(d) An alien may be sued in any district.

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought –

> **(1)** in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(g) A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

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9 U.S.C. § 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

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9 U.S.C. § 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of

the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

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9 U.S.C. § 301. Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

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9 U.S.C. § 302. Incorporation by reference

Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter-American Convention.

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9 U.S.C. § 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

[1929] LEAGUE OF NATIONS

Treaty Series

Publication of Treaties and International Engagements registered with the Secretariat of the League of Nations

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No. 2096.

GERMANY, AUSTRIA, BELGIUM, GREAT BRITAIN, NEW ZEALAND, etc.

Convention on the Execution of Foreign Arbitral Awards. Signed at Geneva, September 26, 1927.

No. 2096. – CONVENTION[1] ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS. SIGNED AT GENEVA, SEPTEMBER 26, 1927.

Official texts in French and English. This Convention was registered with the Secretariat, in accordance with its Article 8, July 25, 1929, the date of its entry into force.

THE PRESIDENT OF THE GERMAN REICH; THE PRESIDENT OF THE AUSTRIAN REPUBLIC; HIS MAJESTY THE KING OF THE BELGIANS; HIS MAJESTY THE KING OF GREAT BRITAIN AND IRELAND AND OF THE BRITISH DOMINIONS BEYOND THE SEAS,

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[1] Deposit of ratifications:

New Zealnd, April 9, 1929;
Denmark, April 25, 1929;
Belgium, April 27, 1929;
Estonia, May 16, 1929;
Sweden, August 8, 1929;
Spain, January 15, 1930.

EMPEROR OF INDIA; HIS MAJESTY THE KING OF DENMARK; THE PRESIDENT OF THE POLISH REPUBLIC, FOR THE FREE CITY OF DANZIG; HIS MAJESTY THE KING OF SPAIN; THE PRESIDENT OF THE ESTONIAN REPUBLIC; THE PRESIDENT OF THE FINNISH REPUBLIC; HIS MAJESTY THE KING OF ITALY; HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBURG; THE PRESIDENT OF THE REPUBLIC OF NICARAGUA; HER MAJESTY THE QUEEN OF THE NETHERLANDS; HIS MAJESTY THE KING OF ROUMANIA; HIS MAJESTY THE KING OF SWEDEN; THE PRESIDENT OF THE CZECHOSLOVAK REPUBLIC, signatories of the Protocol on Arbitration Clauses[2], opened at Geneva on September 24th. 1923.

Having resolved to conclude a Convention with the object of supplementing the said Protocol,

Have appointed as their Plenipotentiaries the following:

THE PRESIDENT OF THE GERMAN REICH:
M. Adolph Müller, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council;

THE PRESIDENT OF THE AUSTRIAN REPUBLIC:
M. Emerich Peflügl, Minister Plenipotentiary, Representative of the Austrian Federal Government accredited to the League of Nations;

HIS MAJESTY THE KING OF THE BELGIANS:
M.J. BRUNET, Envoy Extraordinary and Minister Plenipotentiary;

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[2] Vol. XXVII, page 157; Vol. XXXI, page 260; Vol. XXXV, page 314; Vol. XXXIX, page 190; Vol. XLV, page 116; Vol. L, page 161; Vol. LIX, page 355; Vol. LXIX, page 79, Vol. LXXII, page 152; Vol. LXXXIII, page 393; and Vol. LXXXVIII, page 312, of this Series.

HIS MAJESTY THE KING OF GREAT BRITAIN AND IRELAND AND OF THE BRITISH DOMINIONS BEYOND THE SEAS, EMPEROR OF INDIA:

FOR GREAT BRITAIN AND NORTHERN IRELAND, and all parts of the British Empire which are not separate Members of the League of Nations:

Sir Austen CHAMBERLAIN, K.G., M.P., His Britannic Majesty's Secretary of State for Foreign Affairs;

FOR NEW ZEALAND:

Sir C.J. PARR, High Commissioner for New Zealand in London:

HIS MAJESTY THE KING OF DENMARK:

M.A. OLDENBURG, Envoy Extraordinary and Minister Plenipotentiary to the Swiss Federal Council; Permanent Representative accredited to the League of Nations;

THE PRESIDENT OF THE POLISH REPUBLIC, FOR THE FREE CITY OF DANVIG:

M. Francois SOKAL, Minister Plenipotentiary Delegate accredited to the League of Nations;

HIS MAJESTY THE KING OF SPAIN:

Marquis de la TORREHERMOSA, Envoy Extraordinary and Minister Plenipotentiary accredited to the Swiss Federal Council;

THE PRESIDENT OF THE ESTONIAN REPUBLIC:

M.H. SCHMIDT, Acting Minister for Foreign Affairs;

THE PRESIDENT OF THE FINNISH REPUBLIC:

M. Rudolf HOLSTI, Envoy Extraordinary and Minister Plenipotentiary, Permanent Delegate accredited to the League of Nations;

THE PRESIDENT OF THE FRENCH REPUBLIC:

M. Aristide BRIAND, Minister for Foreign Affairs;

HIS MAJESTY THE KING OF ITALY:
M. Vittorio Scialoja, Senator of the Kingdom;

HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBURG:
M. Joseph BECH, Minister of State, President of the Grand-ducal Government;

THE PRESIDENT OF THE REPUBLIC OF NICARAGUA:
M.T.F. MEDINA, Envoy Extraordinary and Minister Plenipotentiary to the President of the French Republic;

HER MAJESTY THE QUEEN OF THE NETHERLANDS:
Jonkheer F. BEELAERTS VAN BLOKLAND, Minister for Foreign Affairs;

HIS MAJESTY THE KING OF ROUMANIA:
M.C. ANTONIADE, Minister plenipotentiary, Permanent Representative of Roumania to the League of Nations;

HIS MAJESTY THE KING OF SWEDEN:
M. Karl Ivan WESTMAN, Envoy Extraordinary and Minister pPenipotentiary to the Swiss Federal Council;

THE PRESIDENT OF THE CZECHOSLOVAK REPUBLIC:
M. Zdenek FIERLINGER, Envoy Extraordinary and Minister Plenipotentiary accredited to the Swiss Federal Council.

Who, having communicated their full powers, found in good and due form, have agreed on the following provisions:

Article I.

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement whether relating to

existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary:

(a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constitutioned in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition, appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) That the recognition or enforcement of the award is not contrary to the public policy or to the

principles of the law of the country in which it is sought to be relied upon.

Article 2.

Even if the conditions laid down in Article I hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:

(a) That the award has been annulled in the country in which it was made;

(b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matter beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it think fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

Article 3.

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article I *(a)* and *(c)* and Article 2 *(b)* and *(c)*, entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse

recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Article 4.

The party relying upon an award or claiming its enforcement must supply, in particular:

(1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

(2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 *(d)*, in the country which it was made;

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article I, paragraph I and paragraph 2 *(a)* and *(c)*, have been fulfilled.

A translation of the award and of the other documents mentioned in the Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

Article 5.

The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Article 6.

The present Convention applies only to arbitral awards made after the coming-into-force of the Protocol on Arbitration Clauses, opened at Geneva, on September 24, 1923.

Article 7.

The present Convention, which will remain open to the signature of all the signatories of the Protocol of I923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of I923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

Article 8.

The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

Article 9.

The present Convention may be denounced on behalf of any Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notification, to all the other Contracting Parties, at the

same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration clauses shall entail, *ipso facto*, the denunciation of the present Convention.

Article I0.

The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such Colonies, Protectorates or territories to which the Protocol on Arbitration Clauses, opened at Geneva on September 24, I923, applies, can be affected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

Article III.

A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of

Nations to every Member of the League of Nations and to every non-Member State which signs the same.

In faith whereof the above-named Plenipotentiaries have signed the present Convention.

Done at Geneva, on the twenty-sixth day of September one thousand nine hundred and twenty-seven, in a single copy, of which the English and French texts are both authentic, and which will be kept in the archives of the League of Nations.

UNITED NATIONS CONFERENCE

ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION

ON THE RECOGNITION AND ENFORCEMENT

OF FOREIGN ARBITRAL AWARDS

UNITED NATIONS

1958

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of

legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.[1]

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the

[1] For note by the Department of State, see p. 2361.

following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnished to the competent authority where the recognition and enforcement is sought, proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the

country where recognition and enforcement is sought finds that:

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of

Foreign Arbitral Awards of 1927[1] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice,[2] or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

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[1] 27 LNTS 157 ; 92 LNTS 301.

[2] TS 996 ; 59 Stat. 1055.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the Ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the secretary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favorable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(*c*) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations, Denunciation shall take

effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(*a*) Signatures and ratifications in accordance with article VIII;

(*b*) Accessions in accordance with article IX;

(*c*) Declarations and notifications under articles I, X and XI;

(*d*) The date upon which this Convention enters into force in accordance with article XII;

(*e*) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

The Governments of the Member States of the Organization of American States, desirous of concluding a convention on international commercial arbitration, have agreed as follows:

Article 1

An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.

Article 2

Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridical person.

Arbitrators may be nationals or foreigners.

Article 3

In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.

Article 4

An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have

the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.

Article 5

1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:

a. That the parties to the agreement were subject to same incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made; or

b. That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or

c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or

d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried

out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or

e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:

a. That the subject of the dispute cannot be settled by arbitration under the law of that State; or

b. That the recognition or execution of the decision would be contrary to the public policy ("ordre public") of that State.

Article 6

If the competent authority mentioned in Article 5.1.e has been requested to annul or suspend the arbitral decision, the authority before which such decision is invoked may, if it deems it appropriate, postpone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to provide appropriate guaranties.

Article 7

This Convention shall be open for signature by the Member States of the Organization of American States.

Article 8

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 9

This Convention shall remain open for accession by any other State. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 10

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification.

For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 11

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time

of signature, ratification or accession, declare that this Convention shall ex-tend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 12

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Conventions shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 13

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the Member States of the Organization of American States and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the declarations referred to in Article 11 of this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE AT PANAMA CITY, Republic of Panama, this thirtieth day of January one thousand nine hundred and seventy-five.

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(2)

No. 07-254

FILED
OCT 19 2007
CLERK

IN THE

Supreme Court of the United States

TERMORIO S.A. E.S.P. and LEASECO GROUP, LLC,

Petitioners,

v

ELECTRIFICADORA DEL ATLANTICO S.A. E.S.P. (in liquidation) and REPUBLIC OF COLOMBIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under the New York Convention, a district court has the discretion not to enforce an arbitration award that has been set aside by a court of the country where the award was made. Did the District Court abuse that discretion in refusing to enforce an award already set aside by Colombia's highest court, when the party seeking enforcement did not allege that the Colombian decision was corrupt or similarly improper, but alleged only that it was wrongly decided?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Electrificadora Del Atlantico S.A. E.S.P. ("Electranta") and the Republic of Colombia ("Republic") hereby state that Electranta was a public utility company established by the Republic and was majority-owned by the Republic. It had no owners in the United States. Electranta was in the process of liquidation while the matter was proceeding in the District Court and was so identified in the Amended Complaint. The entity has since been liquidated. Its assets are controlled by a trust named Patrimonio Autonomo Electrificadora del Atlantico and the trustee is Fiduciaria La Previsora S.A.

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RULES AND REGULATIONS

Supreme Court Rule 15 6

STATEMENT OF THE CASE

I. Introduction

This case arises from a dispute under a contract between two Colombian companies, Electranta and TermoRio S.A. E.S.P. ("TermoRio"), to buy and sell electrical power in Colombia. The parties agreed to be bound by Colombian law. A Colombian arbitration panel issued an award in favor of TermoRio. TermoRio filed 2 different lawsuits in the Colombian courts seeking to enforce the award against both Electranta and the Republic itself, while Electranta moved before the Colombian courts to set aside the award. In December 2000, the Council of State, Colombia's highest administrative court, vacated the award on the grounds that the arbitration violated Colombian law in effect at the time of contracting. Colombian law, at that time, prohibited instrumentalities of the Colombian government from using the arbitration processes of the International Chamber of Commerce ("ICC") to resolve disputes.

After the award was vacated, and while one of the lawsuits filed by TermoRio in Colombia was still pending, TermoRio and an American shareholder, LeaseCo Group, LLC ("LeaseCo"), filed suit in the District Court for the District of Columbia. The plaintiffs asked that the court enforce the now-vacated award and that the award be entered against the Republic itself under a theory of "veil-piercing." The plaintiffs further alleged that Electranta and the Republic had breached the underlying contract with TermoRio and had fraudulently conveyed Electranta's assets, and that the Republic had been guilty of "expropriation" in its nationalization of Colombian utilities.

Electranta and the Republic moved to dismiss the case under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] ("Convention"), 9 U.S.C. § 201; the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605; the doctrine of forum non conveniens; and the statute of limitations, among other grounds. The plaintiffs stipulated to the dismissal of the expropriation claim and the fraudulent conveyance claim, leaving only the breach of contract claim and the arbitration award enforcement.

In a lengthy written decision, Senior District Judge Oberdorfer dismissed the claim seeking enforcement of the award because the award had been vacated by Colombia's highest court under Colombian law, and because TermoRio did not allege any facts which, if proven, would cause the court to disregard the Colombian court's decision. The District Court further ruled, in the alternative, that the enforcement claim lacked virtually any connection to the United States, and should therefore be dismissed under the doctrine of forum non conveniens. The Court also dismissed the remaining breach of contract claim.

The Court of Appeals affirmed the District Court's dismissal for failure to state a claim, but did not reach the issue of whether the claim should also be dismissed on forum non conveniens grounds. Hewing to the analysis employed by the Second Circuit, the District of Columbia Circuit held that the Convention mandates

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997.

different regimes for review of arbitral awards, depending on which is the "primary" court. A court in the country in which the award is made — as the "primary" court — can set aside an arbitral award in accordance with its domestic arbitral law. By contrast, a court asked to enforce an arbitral award issued in another country is required to enforce the award unless the party opposing enforcement can satisfy one of a limited number of exceptions to enforcement set forth in Article V of the Convention. One exception to enforcement is when an award has been vacated by a court in the country where the award was rendered. (Pet. App. 84 (Art. V(1)(e)).)

Here, Colombia's highest court vacated the award based on its conclusion that the arbitration was convened in a way that violated Colombian law. That decision by the court in the "primary" state is permitted under the Convention. The District Court, as the enforcement court for the "secondary" state, could, and did, honor the decision of the primary court on the question of the primary state's domestic arbitration law.

This Court should not grant a writ of certiorari. The decisions below were correct. The District Court had discretion to deny enforcement of the vacated arbitral award. It did not abuse its discretion in choosing to defer to the Council of State's determination and application of Colombian law. Moreover, there is no split in the Circuits. The Court of Appeals decision is consistent with the only other circuit court decision addressing the enforcement of a foreign arbitral award vacated by the court in the country in which the award was made. This

case does not present an important unsettled area of federal law requiring Supreme Court guidance. Rather, this case is a domestic Colombian dispute which raises no important federal issues. Finally, the unique facts of this case make it an inappropriate one for review by this Court. Unlike a typical enforcement action, the petitioners here seek both to "reinstate" a vacated award and to extend and enforce the award against a non-party. Both inquiries would require the United States courts to delve deeply into issues of Colombian law and adjudicate facts arising entirely in Colombia. The District Court's dismissal on forum non conveniens grounds was a sound exercise of discretion, and provides an independent reason why the dismissal should not be disturbed, and why a writ of certiorari should not be granted.

Because the decision below is correct, is limited by its unique record, and creates no inter-circuit conflict, this case presents no question that justifies review.

II. Factual Background

The facts in this case are carefully set forth in the District Court's Memorandum opinion, (Pet. App. 30-34), and are incorporated herein by reference.

III. Proceedings Before the United States Courts

A. District Court Litigation

After the Council of State vacated the arbitral award, TermoRio filed suit in the United States District Court

for the District of Columbia against Electranta and the Republic. TermoRio's amended complaint asserted four causes of action: (i) a claim to enforce the vacated arbitral award; (ii) a breach of contract claim; (iii) a fraudulent conveyance claim; and (iv) an expropriation claim. Pursuant to stipulation, TermoRio subsequently dropped its fraudulent conveyance and expropriation claims, leaving only the arbitration award enforcement claim and the breach of contract claim. (Pet. App. 35.) The parties filed extensive briefing papers, including affidavits and documentary evidence regarding the Colombian litigation.

The District Court dismissed the breach of contract claim on the grounds that the court lacked subject matter jurisdiction over that claim under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605, and also on the alternative grounds that the breach of contract claim was barred by the applicable statute of limitations. (Pet. App. 42-48.)

The District Court dismissed the claim for enforcement of the vacated arbitral award because the award had been vacated by Colombia's highest administrative court under Colombian law and there was no reason not to recognize that decision. TermoRio did not allege that the Colombian courts were corrupt; TermoRio did not have facts to suggest that the Colombian court's decision was repugnant to American public policy. (Pet. App. 56-60.) The District Court carefully considered both the substantive basis of the Colombian court's decision and TermoRio's criticism of that decision. *Id.* at 58-60.

The District Court also ruled, as alternative grounds for dismissal of both remaining counts of TermoRio's amended complaint, that the claims lacked virtually any connection with the United States, and should therefore be dismissed under the doctrine of forum non conveniens. *Id.* at 60-63.

The District Court further ruled that LeaseCo, as a stockholder of a stockholder of TermoRio, lacked standing to bring suit. *Id.* at 37-39.

B. Appeal to Court of Appeals

TermoRio appealed the dismissal of its claim for enforcement of the vacated arbitral award to the Court of Appeals for the District of Columbia Circuit, but failed to appeal the dismissal of its breach of contract claim. The Court of Appeals affirmed the dismissal on the grounds that it failed to state a claim, but did not address whether dismissal was also warranted on the grounds of forum non conveniens.[2]

IV. TermoRio's Misstatement of the Questions Presented

Pursuant to Supreme Court Rule 15.2, Respondents submit that Petitioners have materially misstated the rulings below.

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[2] The Court of Appeals also stated that it was not necessary to resolve the issue of whether LeaseCo had standing to appeal. (Pet. App. 7-8.) Thus, before this Court, LeaseCo appears as a petitioner only in its capacity as successor-in-interest to TermoRio, *see* Pet. at ii, and not as a petitioner in its own right regarding its claims which were dismissed by the District Court.

The first *Question Presented* by TermoRio – "[In deciding] whether to defer to a foreign court proceeding nullifying an international arbitral award, is a United States court required to ignore the substantive basis of the foreign nullification decision and address only the question of whether the nullification proceeding was procedurally 'tainted'?" – materially mischaracterizes both the record and the decisions of the courts below.

TermoRio mistakenly describes the Colombian court's decision as an annulment of an "international arbitral award." (Pet. at i.) On the contrary, this was a purely domestic arbitration. In fact, the District Court labeled it "a peculiarly Colombian affair," because it was a dispute involving two Colombian parties over a contract to perform services in Colombia in which the parties agreed to be bound by Colombian law. (Pet. App. 23, 60.) The dispute only became "international" when TermoRio, disappointed by the Colombian court's annulment decision, attempted to enforce the award in the United States.

Further, the District Court *did not* hold that it was "required to ignore the substantive basis" of the Colombian court's decision. In fact, the District Court carefully considered the substantive basis of the decision, and also carefully considered the criticism of that decision contained in the affidavits of a Colombian lawyer and an American law professor submitted by TermoRio in support of its claim. *Id.* at 58-60. Noting that TermoRio's own expert conceded that Colombian law did not allow the parties to agree to the arbitration process

that was employed, the District Court found that the Colombian court's decision was "plausible on the merits," and ruled that even if the Colombian court had made a mistake in its legal reasoning, such a mistake would not be a sufficient reason for the District Court to refuse to enforce the decision. *Id.*

The second *Question Presented* by TermoRio – "Should a United States enforcement court defer to a foreign nullification decision where that decision is based on grounds that the Convention expressly excludes as a defense to enforcement?" – is based on an inaccurate recitation of the terms of the Convention. The Convention does not purport to limit the grounds on which a court may nullify a domestic arbitral award. Just as it does not supersede the Federal Arbitration Act with respect to the grounds on which a United States court may nullify an arbitral award issued in this country, it does not purport to affect the comparable law of other signatory nations regarding the grounds for setting aside an award in those signatory nations.

TermoRio's mischaracterization of the decisions below might make the petition sound more "certworthy." But the *Questions Presented* are fundamentally skewed and do not provide a reliable analysis of the actual issues. As discussed in the next section, the answer to the actual question presented by this case is clear-cut under existing law and therefore does not warrant additional review by this Court.

REASONS FOR DENYING THE PETITION

I. The District of Columbia Circuit's Decision is Correct

The District Court's decision not to enforce the nullified award, and the Court of Appeals' affirmance of that decision, were well-grounded in the Convention and fully supported by the facts of this case.

Both the United States and Colombia are signatories to the Convention, which provides that signatory nations are to recognize and enforce arbitral awards rendered in other nations. (Pet. App. 81 (Art. I(1)).) However, Article V(1)(e) of the Convention expressly recognizes that the enforcement of an award "may be refused" upon proof that the award was set aside by competent authority in the country in which the award was made. *Id.* at 83-84.

After exhaustively analyzing both the appropriate sections of the Convention and established precedent, the District Court correctly held that when a competent foreign court has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary circumstances, and that such circumstances were not present in this case. *Id.* at 56. *See also Baker Marine (Nigeria) Ltd. v. Chevron (Nigeria) Ltd.*, 191 F.3d 194 (2d Cir. 1999); *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999).

There was no question that Article V(1)(e) applied to this situation, since the Colombian court had already

set aside the award before TermoRio sought enforcement. But the District Court did not simply rubber-stamp the nullification of the award. Rather, in exercising its discretion, the District Court carefully analyzed the Colombian court decision and enumerated several reasons why the annulment decision was "not repugnant to" U.S. public policy. (Pet. App. 56.) First, TermoRio had previously invoked the Colombian courts to enforce its award. The District Court aptly noted that this fact alone "suggests considerable confidence and trust in the Colombian court system." *Id.* at 57. Second, TermoRio's contention that the Colombian court was looking for *any* reason to nullify the award was incongruent with the Colombian court's detailed review and ultimate rejection of Electranta's other arguments for vacating the award. *Id.* at 59. The Colombian court's decision is 92 pages long and offers a detailed analysis of Colombian law and legal principles. (*See* J.A. 173-266.)[3] Ultimately, that court rested its decision on Colombian law, not on a "second-guess" of the merits of the arbitration itself. Further, TermoRio concededly did not present any evidence of corruption, bribery, or coercion of Colombian judges leading to rulings adverse to TermoRio. *Id.* at 1026:11-18, 1071-72. As Judge Oberdorfer properly concluded on this subject:

> [I]t takes much more than an allegation that a decision was results-oriented to demonstrate that it was "repugnant," particularly when, as

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[3] "J.A." refers to the Joint Appendix filed in the appeal before the Court of Appeals for the District of Columbia Circuit.

> here, the decision seems plausible on the merits. Consistent with *Ingenohl [v. Olsen & Co.*, 273 U.S. 541 (1927)] a determination that the Colombian court made a clear mistake is not sufficient to refuse to enforce it.

(Pet. App. 59-60.)

In its petition, TermoRio argues that the Court of Appeals "abdicated its responsibility to consider the substance of the [Colombian court's] decision." (Pet. at 16.) It erroneously contends that the Colombian court contravened the Convention when it applied Colombian domestic law to invalidate the parties' arbitration. Accordingly, TermoRio is asking the Court to adopt a rule requiring federal courts to look behind foreign judgments based on foreign law to see if the judgment conflicts with the principles underlying the Convention. Such a rule is untenable. It would distort the Convention, disregard settled principles of law, and upend fundamental notions of comity.

Contrary to TermoRio's contention, the Convention does not supplant the laws of the country where the arbitration award is made (the primary state). (Pet. App. 81 (Art. I(1).) Indeed, the Convention makes clear that "the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law." *Yusuf Ahmed Algahanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997); *see also Kahara Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287-88 (5th Cir. 2004). The Convention therefore envisions occasions where the primary state will vacate

an award on grounds that are not consistent with the laws and policies of the state where enforcement is sought (the secondary state). (Pet. App. 18.) Notwithstanding any conflict of laws, Article V(1)(e) of the Convention expressly permits a secondary state to defer to a primary state's nullification decision.[4] *Id.* at 84.

In affirming the District Court's decision to defer to the Colombian court, the Court of Appeals reviewed carefully TermoRio's claim, and applied the correct standard in assessing the relative roles of the federal court and the foreign court:

> [A]ppellants are simply mistaken in suggesting that the Convention policy in favor of enforcement of arbitration awards effectively swallows the command of Article V(1)(e). A judgment whether to recognize or enforce an award that has not been set aside in the State in which it was made is quite different from a judgment whether to disregard the action of a court of competent authority in another State. . . . The Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment

[4] Indeed, Article VI of the Convention expressly authorizes an enforcement court to "adjourn" its consideration of the enforcement request if there is an application pending before a competent authority in the primary state to set aside the award. (Pet. App. 85.) There would be no reason to "adjourn" an enforcement action unless the Convention anticipated that the enforcement court should be guided by the conclusion of the primary state's court.

> of a court in a primary State, when the court in the primary State has lawfully acted pursuant to "competent authority" to "set aside" an arbitration award made in its country.

Id. at 18-19.

Because the District Court did not abuse its discretion in deferring to the Colombian court's application of Colombian law and because TermoRio offered no sufficient basis to establish that the annulment decision was repugnant to U.S. public policy, the Court of Appeals correctly affirmed the District Court's dismissal for failure to state a claim.

II. There is No Inter-Circuit Conflict

In affirming the District Court's decision, the Court of Appeals noted and followed the reasoning of the Second Circuit, the only other court of appeals to consider this issue. (Pet. App. 15.) In *Baker Marine (Nigeria) Ltd. v. Chevron (Nigeria) Ltd.*, 191 F.3d 194 (2d Cir. 1999), a litigant tried to enforce an arbitration award in a New York district court. The award was entered in Nigeria but had been set aside by a Nigerian court based on Nigerian law. *Id.* at 195-96. Even though the Nigerian court had set aside the award on grounds that would not have applied in an American court, the Second Circuit declined to enforce the award. It reasoned

that to do otherwise would encourage losing parties to shop around for a favorable forum:

> [A]s a practical matter, mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary "with enforcement actions from country to country until a court is found, if any, which grants the enforcement."

Id. at 197 n.2 (*quoting* Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 355 (1981)). *See also Spier*, 71 F. Supp. 2d at 286.

The District Court had before it a decision by Colombia's highest court that the composition of the arbitral authority violated Colombian law and that the resulting award should be set aside. (J.A. 19-20, ¶ 33; 242-57 & 265-66.) In affirming the District Court, the Court of Appeals correctly noted that the Council of State is the final expositor of Colombian law and that the District Court did not abuse its discretion under the Convention when it refused to second-guess that decision. (Pet. App. 23.)

TermoRio acknowledges that the District of Columbia is the only proper forum for comparable enforcement proceedings in the future, namely enforcement actions against foreign governments or the instrumentalities of those governments. (Pet. at 26.) But because there is no actual inter-circuit conflict, or any apparent threat of one, and because the decision of the Court of Appeals is correct, this case does not present a compelling basis to grant certiorari.

III. This Case Does Not Satisfy Other Traditional Certiorari Criteria

TermoRio claims that its petition raises an "important question of federal law that has not been, but should be, settled by this Court." (Pet. at 24.) It insists that foreign venturers will have no assurance that their arbitration agreements will be honored unless U.S. courts are required to substantively review a foreign court's nullification decision to ensure it is consistent with the Convention.

This argument turns the Convention on its head and calls for an unprecedented expansion of the federal judiciary's role into the application of foreign law by foreign courts. The Convention governs the enforceability of arbitration awards in countries other than where the award was issued. (Pet. App. 81 (Art. I(1)).) The Convention limits the grounds on which a court may refuse to enforce an arbitral award issued in another country under that country's laws. *Id.* at 83-84 (Art. V). It does not, however, purport to limit the ability of the forum country's courts to review arbitration awards under the forum's domestic arbitration laws.

A competent court in the country where the award is issued may set aside that award for any reason consistent with its laws. And the Convention expressly permits a court in the country where enforcement is sought to defer to the forum court's nullification decision. *Id.* at 84 (Art. V(1)(e)). As the Court of Appeals correctly noted, the Council of State is "the final expositor on Colombian law and we are in no position to pronounce the decision of that court wrong." *Id.* at 23. Accordingly, any endorsement of what TermoRio seeks in its petition would undermine the Convention and seriously undercut fundamental notions of comity.

Moreover, up until the time that TermoRio sought its "second opinion" in the District of Columbia, this case did not present any federal issue whatever. This was a Colombian domestic dispute that TermoRio sought to federalize after the award was vacated and after its earlier efforts to secure relief in Colombia were thwarted. There is simply no urgent federal law issue at stake here nor are these facts likely to be replicated in future cases.

IV. This Case Is An Inappropriate Vehicle for Supreme Court Review

Even assuming there were important unsettled federal law issues surrounding the Convention, this case is an inappropriate vehicle in which to decide them. In assessing a petition, the Court presumably tries to weed out cases where matters outside the issue presented would moot or render meaningless the Court's efforts.

Here, there are several factors that make this case an inappropriate occasion for the use of the Court's limited time and resources.

A. Forum non conveniens dismissal remains in place

The District Court ruled, in the alternative, that the complaint should be dismissed on the grounds of forum non conveniens. (Pet. App. 60.) The issues that would have to be tried in connection with TermoRio's efforts to restore the vacated arbitral award and pierce the corporate veil so as to hold the Republic liable for the obligations of its instrumentality, would be governed by Colombian law, and would require detailed analysis of actions of Colombian government officials taken in Colombia. TermoRio conceded that its case would be difficult to try in the United States. *Id.* at 63. The parties and witnesses are all from Colombia, the documents are in Spanish, and the case concerns a Colombian contract, governed by Colombian law. *Id.* The District Court correctly reasoned that this "peculiarly Columbian affair" should be adjudicated in that country, where there was an adequate forum. *Id.*

An order dismissing a case on forum non conveniens grounds is reversed only when there has been a clear abuse of discretion. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). In affirming the dismissal, the Circuit Court found it unnecessary to reach this alternative holding. (Pet. App. 8.) But during oral argument, one circuit judge expressed the view that TermoRio would have "an unbelievably difficult time in getting a reversal ... unless the District Court is just

completely off the [wall] in citing the factors, and the factors here seem well within the District Court's discretion to say this [case] is not appropriately here." (2/12/07 Tr. at 11:9-13; *see also id.* at 13:18-20 (referring to the "unbelievably tough abuse of discretion standard to prevail on" in light of the District Court's consideration of the forum non conveniens factors).)

Respondents agree that it would be "unbelievably difficult" to reverse the ruling on forum non conveniens if this case were remanded to the Court of Appeals. The viability of the alternative dispositive ruling, which is not before this Court, would cause the matter to be dismissed on remand. Failing to recognize this problem at the outset – and TermoRio fails to address it at all – could result in "bringing to naught the parties' briefing and arguments, and the Justices' deliberations." *Roper v. Weaver*, __ U.S. __, 127 S.Ct. 2022, 2026 (2007) (Scalia, J., dissenting from order dismissing writ as improvidently granted).

B. TermoRio's inconsistent positions have left a muddled record for review

Not only does this case have procedural problems, but there are record inconsistencies that make this case an inappropriate vehicle for resolving the questions that TermoRio has framed.

As discussed above, TermoRio has taken inconsistent, exaggerated, and simply incorrect positions as this matter has proceeded from initial filing, through district court and circuit court review. Along the way,

TermoRio has conceded significant points that would complicate Supreme Court review if a complete record were assembled and full briefing were ordered.

For example, before the Court of Appeals, TermoRio conceded that it was not challenging the propriety of the Colombian court's nullification of the arbitration award. (2/12/07 Tr. at 5, 8.) Now, TermoRio contradicts its earlier position by stating that the Colombian court "improperly" nullified the award. (Pet. at 26.) This Court does not have a clean record of TermoRio's precise position regarding the role of the Colombian court.

TermoRio hints to this Court that there was something scurrilous in the ruling of Colombia's highest court. *See*, *e.g.*, *id.* at 25 (minimizing the Colombian decision by describing it as a proceeding "free of overt procedural 'taint'"). But TermoRio acknowledged to the District Court that it did not have evidence of illegality or corruption in the conduct of the Colombian court proceedings. (Pet. App. 59.) TermoRio cannot have it both ways.

In sum, this case is not one where the record crisply defines a discrete issue requiring Supreme Court review. To the contrary, the full record will appear a mishmash of claims, arguments, and issues advanced by TermoRio, and will not be an appropriate vehicle for resolving questions under the Convention.

C. TermoRio's arguments would open the federal courthouse doors to significant entanglements with foreign courts

TermoRio's argument is that under the Convention, the federal courts become mandatory "courts of last resort" for international arbitration participants to vet their arguments about whether awards can be set aside by competent courts in other countries. In front of the Circuit Court, TermoRio described that role as requiring the federal court to "peel[ ] back the layers of this nullification decision to see what it really is." (02/12/07 Tr. at 9:4-5.) In this Court, TermoRio warns that foreign venturers will view the D.C. Circuit decision as meaning that "no United States court will step in to guarantee their Convention rights." (Pet. at 25.)

TermoRio is arguing for an unprecedented expansion of the federal judiciary's role into the application of foreign law by foreign courts. Nothing in the Convention supports the view that an American court must analyze how a foreign court interpreted its own (foreign) arbitration laws at the behest of a party that lost that argument in that foreign forum.

But even if someone had a plausible basis for pursuing this novel argument, TermoRio has no basis for pursuing it on this record. It is plain that the District Court applied the correct standard and satisfied itself that the Colombian court's decision was "plausible on the merits." (Pet. App. 59.) Other than the affidavits of a Colombian lawyer and an American law professor who were critical of the Colombian court decision, TermoRio proffered no evidentiary basis for a federal court to

"peel back the layers." This is not a case in which a party submitted a record sufficient to support the legal argument it now advances. The Court would find itself rendering an unnecessary and advisory opinion on an incomplete record.

CONCLUSION

The District Court's exercise of its discretion not to enforce a foreign arbitration award nullified by a competent foreign court was properly affirmed, and the District of Columbia Circuit is in accord with the only other court of appeals to consider this issue. For all the reasons discussed above, the petition for certiorari should be denied.

Respectfully submitted,

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No. 07-254

In the
Supreme Court of the United States

TERMORIO S.A. E.S.P. and LEASECO GROUP, LLC,
Petitioners,
v.

ELECTRIFICADORA DEL ATLANTICO S.A. E.S.P. (in liquidation) and REPUBLIC OF COLOMBIA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In their Brief in Opposition, Respondents accuse Petitioners of "asking the Court to adopt a rule requiring federal courts to look behind foreign judgments based on foreign law to see if the judgment conflicts with the principles underlying the Convention." Br. in Opp. at 11.

But the decision to create that judicial role was not Petitioners'. That decision was made by the signatories to the New York Convention. Those signatories decided that the era of total forum-state control over arbitration awards—which undermined the international arbitration regime and had a stultifying effect on international commerce—had to end. They created an internationally binding set of rules to govern the enforcement of arbitration agreements and awards, and deliberately gave enforcement courts the discretion to disregard forum-state nullification decisions where deference to those decisions would be inconsistent with the Convention's provisions or policies.

To give any real effect to the changes introduced by the Convention's drafters, enforcement courts *must* undertake some substantive review of foreign nullification decisions to determine whether deference is appropriate. If they refuse to do so out of a reluctance to "second-guess" a court of "competent authority," App. 19 (D.C. Circuit opinion), the Convention becomes a toothless document that fails to give international venturers what they require, and what the Convention's signatories sought to give them—assurance that

forum-state courts will not have final authority over their disputes.

That is why the questions presented in the Petition for Review are so critical. And, as discussed below, this case presents an ideal vehicle for this Court's resolution of these questions.

REASONS FOR GRANTING THE WRIT

A. This Case Properly Frames the Questions Presented.

Contrary to Respondents' assertions, the questions set forth in the Petition for Writ of Certiorari are sharply presented by the decisions and record below, with no procedural or other obstacles to their resolution.

1. The Parties' Dispute Is Unequivocally International.

This case is not, as Respondents suggest, a "domestic Colombian dispute," or a "peculiarly Colombian affair." By any rational definition, it is a thoroughly international dispute to which the Convention's provisions and policies apply with full force. Initially, as a matter of plain construction, Petitioners' enforcement action was indisputably governed by the Convention, and Respondents do not argue otherwise. *See* N.Y. Convention, art. I(1) (providing that the classes of awards governed by the Convention include those "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought").

Moreover, to the extent that the international "tone" of a dispute affects the analysis, all of the relevant indicia of "internationality" are abundantly present here. This was a thoroughly international relationship—the Colombian government itself specifically sought out foreign entities to come in and invest in its energy system, and the American company LeaseCo accepted this invitation and invested heavily in a country far from home. The fact that the foreign investors were dealing directly with the host government and its instrumentality amplified the need for the Convention's protections. And while the two nominal parties to the arbitration were Colombian, this was only because the Colombian government itself—the very entity soliciting international investment—required LeaseCo to form Colombian entities as vehicles for the parties' joint venture.

Accordingly, characterizing this case as a "domestic Colombian dispute" borders on the farcical and ignores the real nature of the parties' relationship. *Cf., e.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) (describing the special concerns associated with international transactions as applying to "any contract *touching two or more countries*") (emphasis added); 9 U.S.C. § 202 (providing that an arbitration agreement or award is deemed to fall under the Convention as long as the underlying commercial relationship has some "reasonable relation with one or more foreign states"). In short, the parties' dispute is precisely the type of "international" one for which the Convention's provisions were designed.

2. This Case Has Nothing to Do with the Colombian Court's Interpretation or Application of Colombian Law.

Respondents' repeated descriptions of this case as one whose resolution turns on Colombian law, and their suggestions that Petitioners are asking this Court to review the Colombian court's interpretation of its own law, are entirely erroneous.

In fact, the questions presented in the Petition for Writ of Certiorari are entirely independent of whether the Colombian court correctly applied Colombian law when it purported to nullify Petitioners' award. The Council of State held that the underlying agreement was void because it specified arbitration procedures different from those set forth in domestic Colombian law—in other words, because the parties exercised an internationally enforceable right provided by the New York Convention. The question presented to this Court is not whether that decision was correct as a matter of Colombian law, but whether such a decision should be deferred to under the treaty whose provisions it directly frustrates.

Nor is the matter resolved by making the "primary/secondary" distinction (i.e., between forum-state courts and courts of other enforcement states) adopted by the D.C. Circuit and urged by Respondents. It may be true that the Convention leaves room for forum-state courts to nullify awards on grounds broader than those available in other enforcement courts. *But see* Emmanuel Gaillard,

The Representations of International Arbitration, N.Y.L.J., Oct. 4, 2007, at 3 (reprinted in the Appendix to this Reply ("Reply App.")), Reply App. 12 (questioning the D.C. Circuit's reliance, in *TermoRio*, on "the concept of courts of 'primary' and 'secondary' jurisdiction, which is absent from the New York Convention"). But even assuming that courts of "primary" jurisdiction have the latitude to entertain certain additional defenses to enforcement, those courts' nullification decisions cannot be deferred to where they *directly conflict with specific provisions set forth in the Convention itself.*

That, of course, is what happened here. The Convention sets forth in precise detail what types of procedural defenses may and may not be recognized under the new regime. The Council of State nullified Petitioners' award based on a procedural defense deliberately abolished by the Convention's drafters. By nonetheless deferring to the Council's decision, the lower courts here enabled Respondents to evade enforcement in a way that the Convention's drafters clearly did not intend.

3. The Other Issues in the Case Do Not Complicate This Court's Consideration of the Questions Presented.

Defendants' suggestion that other issues present in this case counsel against accepting review is meritless. As with most cases that this Court reviews, there are other legal questions that would remain to be resolved if the D.C. Circuit's decision were reversed. But that hardly presents a reason

not to review the questions presented by Petitioners. Those questions are perfectly "teed up" by the D.C. Circuit's judgment and opinion and the record of the proceedings below.

Moreover, Respondents greatly overstate the strength of their alternative defenses. For example, while the *district court* did rely on *forum non conveniens* as an alternative ground for dismissal, it did so in direct contravention of recent Circuit precedent unequivocally precluding application of that doctrine when a foreign state or its instrumentality is sued in a United States court for enforcement of an arbitral award. *See TMR Energy, Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303-04 (D.C. Cir. 2005) (holding that because "only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States" (citing 27 U.S.C. §§ 1609, 1610(a)(6)), there was no adequate alternative forum for the enforcement plaintiff's claims and *forum non conveniens* dismissal would be inappropriate).[1] And even without the *TMR Energy*

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[1] While conceding that the D.C. Circuit did not reach the *forum non conveniens* issue, Respondents cite to an exchange during oral argument in which Judge Edwards suggested that the "abuse of discretion" standard of review would make reversal of the district court on this point difficult. But in *TMR Energy*, the D.C. Circuit held as a matter of law that there is no adequate alternative foreign forum in cases such as the present one. Accordingly, putting aside the fact that statements in oral argument do not amount to final judicial determinations, the D.C. Circuit has made it clear that this is not a matter for a district court's discretion. *See, e.g., El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 677 (D.C. Cir. 1996) ("Only if there is an adequate alternative forum must the court then weigh the

rule, the district court's *forum non conveniens* conclusion strains credulity—it expressly rests on the conclusion that Colombia is an adequate alternative forum for a case *in which the dispositive issue is whether to defer to a decision of Colombia's highest court. See* App. 30 ("Col[o]mbia is an adequate and a more appropriate forum for resolution of this case.").[2]

In short, contrary to Respondents' assertions, this case is an ideal vehicle for this Court's resolution of the questions presented in the Petition for Writ of Certiorari.

B. The Lower Courts' Decisions Cannot Simply Be Explained Away as Exercises of "Discretion."

Although Respondents attempt to defend the lower courts' decisions as permissible exercises of "discretion," that characterization cannot withstand scrutiny. First, the mere invocation of the word "discretion"—even where it is legally appropriate—does not unmoor a lower court from any legal standards whatsoever. Even legal determinations typically considered "discretionary" are nonetheless

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relative conveniences to the parties against the presumption of the plaintiff's forum selection."); *cf. Koon v. United States*, 518 U.S. 81, 101 ("A district court by definition abuses its discretion when it makes an error of law.").

[2] Respondents are similarly mistaken in their suggestion that the presence of veil-piercing issues in this case affect this Court's certiorari decision. These issues are entirely independent of the questions presented in the Petition for Writ of Certiorari, and in any event only affect one of the two defendants.

guided by standards set forth by statutory or decisional law. *See, e.g., Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (setting forth factors for courts to consider when faced with a motion to dismiss on *forum non conveniens* grounds); *Koon v. United States*, 518 U.S. 81, 101 (1996) ("The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."). In the present context, one such standard would presumably instruct enforcement courts *not* to defer to forum-state nullification decisions that are based on defenses expressly eliminated by the Convention's signatories.

In any event, in the decision that Petitioners ask this Court to review, the D.C. Circuit effectively forbade *any* exercise of discretion in favor of *enforcing* awards. That court held that an enforcement court is *required* to defer to a forum-state nullification decision absent evidence that the nullification action was procedurally "tainted." *See* App. 3 ("Because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic, the District Court was, as it held, *obliged to respect it.*") (emphasis added).

That is not an invitation to the exercise of discretion, but a rule of law. Moreover, as discussed in the Petition for Writ of Certiorari, that rule is effectively the law of the United States for a significant class of cases—those involving attempts to enforce arbitration awards against foreign governments or their instrumentalities.

C. A Recent Article Highlights the Significance of the Questions Presented.

A recent law journal article highlights the significance of the questions presented by Petitioners. *See* Gaillard, *supra*, at Reply App. 1-14. Noting that "[o]ne of the most hotly debated subjects is that of the recognition and enforcement of awards set aside in the country where the award was rendered," Reply App. 2, the author accurately describes the D.C. Circuit as having come down on the extreme end of the degree-of-deference spectrum. *See* Reply App. 12 (describing the D.C. Circuit's "interpret[ation of] '[r]ecognition and enforcement of the award *may* be refused' in [Article V(1)(e)] to mean '[r]ecognition and enforcement of the award *shall* be refused' if the award has been set aside in the country in which it was rendered").

The article goes on to describe the severe effect of such a rule on the international arbitration regime:

> This conception of international arbitration . . . results in re-establishing the two levels of control abolished by the New York Convention and requiring a review of the award itself at the seat of the arbitration followed by the recognition, in other countries and on the basis of the rules applicable to foreign judgments, of the judicial decision

> assessing the validity of the award at the seat of the arbitration.
>
> From a legal standpoint, this decision contravenes both the language and the purpose of the New York Convention. From a policy standpoint, it is an encouragement to the losing party to initiate unnecessary litigation in the country where the award was rendered even where no enforcement is sought in that country.
>
> . . . By recognizing an absolute international effect to the positions taken by the courts of the seat of the arbitration which may happen to be the courts of one of the parties to the arbitration, the *TermoRio* decision is a further encouragement to the party resisting arbitration or the resulting award to engage in tactical maneuvers, whereas one of the main purposes of international arbitration is precisely to avoid one party from being subjected to the courts of the other party.

Reply App. 13-14.

CONCLUSION

Petitioners have asked this Court to consider whether United States federal courts should assess forum-state nullification decisions to determine whether deference to those decisions is consistent with the Convention's provisions and policies. Respondents' Brief in Opposition is sprinkled with dour descriptions of the inconvenience and general unseemliness that will ensue if those courts do so. And there is undoubtedly some truth in Respondents' argument. It would admittedly be much simpler, and (in some ways) more sensitive to the relations between sovereign nations, for United States courts to simply do what the D.C. Circuit did and defer absent tangible evidence of procedural "taint" in the nullification proceedings.

But that is not the regime envisioned by the Convention's signatories. Those signatories knew that the provisions they were enacting would require courts to review the decisions reached by their foreign counterparts, and no doubt understood that this would at times have sensitive or inconvenient implications. Ultimately, they considered this an acceptable price to pay for the creation of a robust, reliable international arbitration regime. When an enforcement court nonetheless affords effectively total deference to the forum-state nullification decision, as the D.C. Circuit did here, the result is that the Convention's key advances are undermined and forum-state courts regain their formidable pre-Convention control over arbitration awards.

This case presents a perfect example. Respondents have evaded enforcement of Petitioners' award through a defense that the Convention's signatories deliberately abolished, through the mere expedient of laundering that defense through a forum-state nullification proceeding prior to the commencement of the enforcement action. The D.C. Circuit refused even to consider whether the basis of that nullification supported deference, instead holding that it had to defer to the Colombian court's decision absent evidence that the nullification action was procedurally "tainted." Petitioners respectfully submit that this is not the result intended by the Convention's drafters and signatories, and that the D.C. Circuit's opinion should not be the law of the United States. Accordingly, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED, this 26th day of October, 2007:

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INTERNATIONAL ARBITRATION LAW

The Representations of International Arbitration

Emmanuel Gaillard

One's view of the relationship between international arbitration and national legal systems determines the response to such fundamental questions as the respective role of the arbitral tribunal and the domestic courts (often those of the seat of the arbitration) – for example, in determining the validity of the arbitration agreement, the arbitrators' power to choose the rules applicable to the merits in the absence of agreement by the parties or the enforcement of an award set aside in the country where it was rendered.

The most significant question in this respect is the source of the arbitrators' power to adjudicate. Does such power emanate from a single national legal system (frequently that of the seat of the arbitration) or is international arbitration an autonomous process where the arbitrators derive their powers from the sum of all legal systems that recognize, under certain conditions, the legal force of the arbitration agreement and the resulting award?

The impact of one's representation of international arbitration is not merely a question of legal theory and entails significant practical consequences (on the representations of international

arbitration from both a theoretical and practical viewpoint, see the course given by the author at The Hague Academy of International Law in July 2007 on "ASPECTS PHILOSOPHIQUES DE L'ARBITRAGE INTERNATIONAL," to be published in the Collected Courses of The Hague Academy, as well as the contribution to the Sixth Brazilian Congress on International Arbitration of Oct. 31, 2006 at Salvador de Bahia on "Souveraineté et autonomie. Réflexions sur les représentations de l'arbitrage international," published in JOURNAL DU DROIT INTERNATIONAL, 2007, No. 3. See also "Autonomy of International Arbitration," NYLJ, Dec. 14, 2006; "L'interfèrence des juridictions du siège dans le déroulement de l'arbitrage," LIBER AMIROCUM CLAUDE REYMOND, 2004, at 83; "Enforcement of Awards Set Aside in the Country of Origin: the French Experience," ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 1999, at 505).

One of the most hotly debated subjects is that of the recognition and enforcement of awards set aside in the country where the award was rendered. Those who view international arbitration as rooted in the legal system of the seat of the arbitration will give significant weight to the position taken by the courts of that country on the validity of the award and will expect the courts of other countries where the recognition and enforcement of the award is sought to

defer to such position. Those, on the contrary, who view international arbitration as a process not rooted in a given domestic legal system but deriving its legal force from the entirety of the legal systems that accept to recognize the arbitral award will consider that each legal system should determine for itself (including through its courts) the conditions under which it will recognize and enforce an arbitral award.

The New York Convention

The rules established by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, today binding on 142 countries, provide elements of response to the above questions. Article III of the convention provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them *in accordance with the rules of procedure of the territory where the award is relied upon*" (emphasis added). In other words, the standards according to which an award 'shall' be recognized are those of the country where recognition and enforcement is sought.

Consistent with this principle, Article V(1)(e) of the convention envisages the situation where the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made," but does not make it compulsory for the courts of other countries to give effect to such circumstances: in such a situation, "[r]ecognition and enforcement of the award *may*

be refused" (emphasis added). That the convention's drafters specifically chose to use the word "may" rather than "shall" shows their intention to preserve the discretion of every legal system to decide for itself, and, based on its own standards, whether or not an arbitral award meets the conditions of recognition and enforcement (see also J. Paulsson, "May or Must Under the New York Convention: An Exercise in Syntax and Linguistics," ARBITRATION INTERNATIONAL, 1998, at 227). In other words, the positions taken by the courts of the seat of the arbitration with respect to the validity of the award have no absolute effect in other legal systems.

The underlying foundation of these rules is the convention's policy in favor of enforcement of arbitral awards. This pro-enforcement philosophy also justifies the rule under Article VII according to which the convention's provisions do not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." It follows that, in circumstances in which the convention's provisions are more restrictive than the ordinary rules applicable in the country where the award is relied upon, the more favorable rules benefit the party applying for recognition and enforcement.

Focus on the Award

These rules, together with Article IV of the convention, which requires the party applying for recognition and enforcement to supply solely the award and the arbitration agreement, constitute one of the greatest achievements of the New York Convention in that they focus on the award itself rather than on the judicial process surrounding the recognition and enforcement of the award in the country where it was rendered. Having abolished the requirement of "double exequatur" contained in the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, the New York Convention no longer requires that an award become "final" in the country where it was rendered in order to be relied upon in another country.

As a result, under the New York Convention, the determination of the validity of an award is conducted on the basis of the award as the primary product of the arbitral process, and not on the basis of the judicial decisions rendered at the seat of the arbitration. The underlying representation is that international arbitration is anchored in all legal systems that accept, according to their respective standards, to recognize the arbitral award, and not in a single legal system assimilating the arbitrators to its judges and integrating their awards into the judicial product of its courts.

This is, for example, the conception long adopted by French case law. French courts have consistently

taken the view that, where an award has been set aside in the country where it was rendered, it can nonetheless be recognized and enforced in France if it meets the requirements of French law (see, in particular, the decisions in Norsolor, Cour de cassation, decision of Oct. 9, 1984, REVUE DE L'ARBITRAGE, 1985, at 431 and, in the English version, INTERNATIONAL LEGAL MATERIALS, 1985, at 360-364; Hilmarton, Cour de cassation, decision of March 23, 1994, REVUE DE L'ARBITRAGE, 1994, at 327 and, in the English version, MEALEY'S INTERNATIONAL ARBITRATION REPORT, vol. 9, Issue 5, May 1994, section E and commentaries at 6-7; and Chromalloy, Paris Court of Appeals, decision of Jan. 14, 1997, REVUE DE L'ARBITRAGE, 1997, at 395 and, in the English version, MEALEY'S INTERNATIONAL ARBITRATION REPORT, vol. 12, Issue 4, April 1997, section B and commentaries at 5-6).

Landmark 'Putrabali' Case

The two decisions rendered on June 29, 2007 by the French Cour de cassation in *PT Putrabali Adyamulia v. Rena Holding* are no exception to this consistent case law. The dispute in that case arose out of the performance of a contract for the sale of white pepper by PT Putrabali Adyamulia (Putrabali) to Rena Holding, with a two-level arbitration in London in accordance with the Rules of Arbitration and Appeal of the International General Produce Association (IGPA). Rena Holding having failed to pay the contract price for cargo lost in a shipwreck during

transport, Putrabali initiated arbitral proceedings in London. A first award ordering Rena Holding to pay the contract price was reversed by a second award of April 10, 2001, holding that Rena Holding was justified in its refusal to pay the contract price (the 2001 award). Following Putrabali's appeal on a point of law, the High Court in London partially annulled the award based on the determination that Rena Holding's failure to pay for the cargo amounted to a breach of contract and remitted the award to the Arbitral Tribunal for reconsideration. On Aug. 21, 2003, the Arbitral Tribunal issued a new award in favor of Putrabali and ordered Rena Holding to pay the contract price of US$163,086 (the 2003 award).

In September 2003, Rena Holding obtained in France the recognition and enforcement of the 2001 award, a decision confirmed on March 31, 2005 by the Paris Court of Appeals (REVUE DE L'ARBITRAGE, 2006, at 665). In turn, Putrabali obtained in France the enforcement of the 2003 award, a decision reversed on Nov. 17, 2005 by the Paris Court of Appeals based on the res judicata effect of the enforcement decision of the 2001 award and the irreconcilable nature of the 2003 award with the 2001 award.

The question before the French Supreme Court was therefore the effect of the partial annulment of the 2001 award and its substitution by the 2003 award or, in other words, the international effect of the English High Court's annulment decision of the 2001 award.

Autonomy of Arbitration

In the first Putrabali decision, the French Cour de cassation maintained the Paris Court of Appeals' reasoning and the former case law on the French courts' discretion to enforce an award set aside by the courts of the seat of the arbitration when the award meets the enforcement requirements of French law set forth in Articles 1502 and 1504 of the New Code of Civil Procedure. The 2001 award meeting the enforcement requirements of French law, there was no justification to refuse its enforcement in France.

The corollary principle, applied in the second Putrabali decision of June 29, 2007, is that the recognition in France of an award set aside in the country where it was rendered is an obstacle to the recognition of a subsequent award rendered following the annulment of the first award, as this would be contrary to the principle of res judicata and the incorporation into the French system of two irreconcilable decisions on the same dispute between the same parties.

These solutions being well-established in French law, the landmark character of the French Supreme Court's decision in Putrabali relates in fact to their ground-breaking justification. The rationale adopted so far by the French courts has been that an arbitral award is "not integrated" into the legal system of the seat of the arbitration and that therefore its annulment by the courts of the seat of the arbitration has no impact on its existence outside the realm of that

particular legal system (see in particular the Hilmarton decision cited above; Paris Court of Appeals' decisions in *Société Bargues Agro Industries v. Young Pecan Company*, June 10, 2004, REVUE DE L'ARBITRAGE, 2004, at 733, and in *La Société SA Lesbats et fils v. Monsieur Volker Le Docteur Grub,* Jan. 18, 2007, unpublished). In Putrabali, the Cour de cassation has reinforced this underlying principle in holding that:

> An international award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought. Under Article VII of the New York Convention of 10 January 1958, Rena Holding was allowed to seek enforcement in France of the award rendered in London on 10 April 2001 in accordance with the arbitration agreement and the IGPA rules, and could invoke the French rules on international arbitration, which do not provide that the annulment of an award in the country of origin is a ground for refusing recognition and enforcement of an award rendered in a foreign country.

In other words, the French Supreme Court has recognized not only that an international arbitral award is not integrated into the legal order of the seat of the arbitration, but that it is not anchored in any national legal order at all. This recognition, however, does not mean that the award is not

attached to any legal system. In further deciding that the arbitral award is a "decision of international justice," the Court has determined that it is rooted in a legal order autonomous from the national legal systems. Each state has discretion to determine for itself and based on its own standards whether or not to recognize and enforce an international arbitral award, but such decisions have no impact on the objective existence of the award as an autonomous international decision which derives its legal force from the community of all states and not from a single legal system.

The 'TermoRío' Decision

The decision in Putrabali can be contrasted with the decision rendered on May 25, 2007 by the U.S. Court of Appeals for the District of Columbia Circuit in *TermoRío S.A. E.S.P. and LeaseCo Group LLC v. Electranta S.P. et al.* The Court of Appeals in that case affirmed the District Court's decision to refuse the enforcement of an award annulled in Colombia as the seat of the arbitration (see *TermoRío S.A. E.S.P. et al. v. Electrificadora Del Atlantico S.A. E.S.P. et al.*, March 17, 2006, 421 F. Supp. 2d 87). The dispute related to the purchase by Electrificadora Del Atlántico (Electranta) of energy supplied by TermoRío, a Colombian state-owned public utility, pursuant to a power purchase agreement containing an arbitration agreement with an ICC arbitration in Colombia. The award in excess of US$60 million rendered in 2000 in favor of TermoRío was challenged in Colombia by

Electranta and the Colombian Council of State (Consejo de Estado), Colombia's highest administrative court, set aside the award on the ground that the arbitration clause violated Colombian law which, at the date of the agreement, did not expressly permit recourse to ICC arbitration.

Referring to Article V(1)(e) of the New York Convention, the Court of Appeals held that:

> The arbitration award was made in Colombia and the Consejo de Estado was a competent authority in that country to set aside the award as contrary to the law of Colombia. See New York Convention art. V(1)(e). . . . Because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic, the District Court was, as it held, *obliged* to respect it. . . . Accordingly, we hold that, because the arbitration award was lawfully nullified by the country in which the award was made, appellants have no cause of action in the United States to seek enforcement of the award under the FAA or the New York Convention. (Emphasis added).

Revival of Double Exequatur

The Court's reasoning is largely based on the "validity of a foreign judgment vacating an arbitration award." Deciding that, under the New York Convention, "the critical element is the place of the

award" and that, notwithstanding the convention's "purpose . . . to encourage the recognition and enforcement of commercial arbitration agreements in international contracts," "only a court in a country with primary jurisdiction over an arbitral award may annul that award," the Court held that, under Article V(1)(e), "a secondary Contracting State normally may *not* enforce an arbitration award that has been lawfully set aside by a 'competent authority' in the primary Contracting State" (emphasis added). By adding the word "not" to the language of Article V(1)(e), the Court interprets "[r]ecognition and enforcement of the award may be refused" in that provision to mean "[r]ecognition and enforcement of the award shall be refused" if the award has been set aside in the country in which it was rendered. This is confirmed by the Court's reference to the "command of Article V(1)(e)." No explanation, however, is provided for such reversal of logic, or for the concept of courts of "primary" and "secondary" jurisdiction, which is absent from the New York Convention. Focusing exclusively on "the judgment of a court of competent authority," whose judgment it cannot "second-guess," the Court never even considers the award itself to determine whether it meets the enforcement requirements of U.S. law.

The Court of Appeals thus endorses the representation that views international arbitration as rooted and entirely integrated into the legal system of the seat of the arbitration. Accordingly, if the award is set aside in that system, it simply does not exist to be enforced in other countries:

> . . . an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully "set aside" by a competent authority in the State in which the award was made.

This conception of international arbitration which, in stark contrast with the Putrabali decision, denies any legal existence to the award outside the realm of the seat of the arbitration, results in re-establishing the two levels of control abolished by the New York Convention and requiring a review of the award itself at the seat of the arbitration followed by the recognition, in other countries and on the basis of the rules applicable to foreign judgments, of the judicial decision assessing the validity of the award at the seat of the arbitration.

From a legal standpoint, this decision contravenes both the language and the purpose of the New York Convention. From a policy standpoint, it is an encouragement to the losing party to initiate unnecessary litigation in the country where the award was rendered even where no enforcement is sought in that country.

The recent proliferation of anti-suit injunctions in international arbitration shows that the courts in an increasing number of states support the recalcitrant conduct of the local party to an arbitration – often a state entity – in its attempt to circumvent the arbitration agreement freely entered into or to resist the resulting arbitral award. By recognizing an absolute international effect to the positions taken by

the courts of the seat of the arbitration which may happen to be the courts of one of the parties to the arbitration, the *TermoRío* decision is a further encouragement to the party resisting arbitration or the resulting award to engage in tactical maneuvers, whereas one of the main purposes of international arbitration is precisely to avoid one party from being subjected to the courts of the other party.

By contrast, adopting the view, consistent with the New York Convention, that no sovereign enjoys exclusive rights or can impose on other sovereigns its views with regard to international arbitration – which is today largely recognized as the ordinary means of settlement of international commercial disputes – and that each state has discretion to determine for itself the requirements according to which it will recognize the validity and legitimacy of the arbitral process, is nothing more than recognition that, in this field, indifference is a virtue.

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